

(29) A. I. R. 1942 Lahore 19

FULL BENCH

TEK CHAND, DIN MOHAMMAD
AND BHIDE JJ.*Gurmukh Singh and another —**Defendants — Appellants*

v.

*Intazamia Committee Gurdwara Bhai
Sewa Singh, Plaintiff and others,
Defendants — Respondents.*

First Appeal No 318 of 1939, Decided on 2nd January 1941, from decree of District Judge, Montgomery at Lahore, D/- 19th May 1939.

(a) Record of Rights — Khasra girdawaris —
Khudkasht — Meaning — Entry in, is not con-
clusive as to residence of owner (Per *Division
Bench*).

The mere entry of khudkasht in khasra girdawaris of a certain village in the name of a person is not conclusive that the person resides in that village for purposes of cultivation as khudkasht does not only mean cultivation by the person himself but also includes cultivation through his servants and associates. [P 21f]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 30 (ii) and 7 (4) — Notice under S. 7 (4) — Person absent from place of residence at time when notice is served cannot be said to have knowledge of fact to which notice relates — Especially so, when property specified in notice is his private property unconnected with Gurdwara — No question of exercising reasonable diligence arises (Per *Division Bench*).

A person who is absent from his place of residence at the time when the notice under S. 7 (4) is served cannot be said to have any knowledge of the fact to which the notice relates and if a person is absent altogether from the place where the notice is issued, there can be no question of his exercising any reasonable diligence to acquire knowledge of the facts to which the notice relates which are not even remotely present to his mind. This is all the more so when the property which is in his possession and was claimed on behalf of the Gurdwara has absolutely no connection whatever with the Gurdwara and he could never imagine that any claim could be put forward to that property on behalf of the Gurdwara. [P 22a, b]

(c) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 3 (ii) and 7 (4)—A transferring his property to B — Long after transfer, Gurdwara claiming property under S. 7 — Notice served on A—A's knowledge cannot be fixed on B (Per *Division Bench*).

Where long after the transfer of his property by A to B, the property is claimed by a Gurdwara under S. 7 and A is served with a notice in respect of the Gurdwara's claim under S. 7 (4), A's knowledge of the fact to which the notice relates cannot be fixed on B and therefore it cannot be said that even by exercise of due diligence, B could have been aware of the fact that the property purchased by him from A had been claimed on behalf of the Gurdwara. [P 22c]

(d) Punjab Sikh Gurdwaras Act (8 of 1925), S. 30 (ii)—Question as to knowledge of notice in respect of Gurdwara's claim depends on facts of case — Precedents are of no use (Per *Division Bench*).

The question whether a person on whom a notice in respect of Gurdwara's claim under S. 7 was served had knowledge of the same depends on the circumstances of each case and no precedent can serve as a safe guide in the matter. [P 22c, d]

(e) Punjab Sikh Gurdwaras Act (8 of 1925), S. 145—Meeting of committee to authorise certain person to institute suit on its behalf—Irregularity in convening meeting is cured by S. 145 unless it has occasioned failure of justice (Per *Division Bench*).

Any irregularity or defect in convening a meeting of the committee of a Gurdwara to authorise a person to institute and prosecute a suit on behalf of the Gurdwara is condoned by S. 145, and the suit instituted by such a person cannot be dismissed by reason of that irregularity or defect in the absence of proof that it has occasioned a failure of justice. [P 22e] f

(f) Punjab Sikh Gurdwaras Act (8 of 1925), S. 30 — Property claimed on behalf of Gurdwara — Defendant not filing claim petition under S. 10 of Act—Suit by Gurdwara after Act for possession of property falls under S. 30 (Per *Full Bench*).

Where certain property is claimed on behalf of a Notified Gurdwara under S. 7 of the Act and no claim petition under S. 10 is filed by the person against whom the property was claimed a suit on behalf of the Gurdwara instituted after the Act came into force for possession of the property falls under S. 30. [P 25d]

(g) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 32 and 30—Applicability—Case falling within provisos to S. 30 (i) and (ii)—S. 32 does not apply —Court has jurisdiction to decide case : 15 Lah 66=(34) 21 A I R 1934 Lah 390=151 I C 890 and g ('35) 22 A I R 1935 Lah 843=160 I C 133, *OVER- RULED* (Per *Full Bench*).

The words "might be made" in S. 32 cannot be construed to mean "might have been made." Section 32 applies only to those cases, which were instituted either before the commencement of the Act, or which were instituted after the commencement of the Act, but before the expiry of the prescribed period of limitation for making a claim under the various sections referred to therein. Section 30 applies, on the other hand, to cases where a claim might have been made but was not made within the prescribed period. Under S. 30, it is only in the exceptional circumstances mentioned in the provisos to S. 30 (i) or (ii) that the claim will be tried on merits in a suit falling under S. 30. Section 32, on the other hand, makes no reference at all to any such circumstances. [P 25k; P 26a] h

Consequently, S. 32 does not apply to cases covered by proviso to S. 30 (i) or by the proviso to S. 30 (ii) and the Court has jurisdiction to decide the same : ('38) 25 A I R 1938 Lah 369 (FB), (*View of Din Mohammad J. approved*); 15 Lah 66=(34) 21 AIR 1934 Lah 390=151 I C 890 and ('35) 22 A I R 1935 Lah 843=160 I C 133, *OVER- RULED*. [P 24f; P 26k]

(h) Interpretation of statutes—Primary test is language used—Words used plain and unambiguous—Court cannot speculate on intention of Legislature (Per *Full Bench*).

The primary test for the interpretation of a statute is the language used therein. When the words used in a statute are plain and unambiguous and admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature and to construe them according to its own notions of what

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ought to have been enacted. To depart from the plain language used on account of such notions is in reality not to interpret the law but to alter it.

[P 26g]

Yashpal Gandhi — for Appellants.
S. Narindar Singh — for Respondents.

JUDGMENT OF DIVISION BENCH

Din Mohammad J. — This appeal has arisen in the following circumstances. The Committee of Management, Gurdwara Bhai Sewa Singh (hereinafter called the Committee) instituted a suit against Gurmukh Singh, Hardit Singh, Megh Singh and seven others under s. 28, Sikh Gurdwaras Act, for possession of various plots of land situate at Qadirabad in the district of Montgomery. It was alleged that a petition had been made in accordance with the provisions of sub-s. (1) of s. 7, Sikh Gurdwaras Act, in respect of Gurdwara Bhai Sewa Singh, accompanied by a list of all rights, titles or interests in the immovable properties inclusive of the Gurdwara which the petitioners claimed to belong within their knowledge to the Gurdwara. It was further stated that the names of persons in possession of such right, title or interest were mentioned in the list and that notices were duly issued to them. No petition, however, was made under sub-s. (1) of s. 10 and, consequently, the Provincial Government published a notification under sub-s. (3) of s. 10, specifying the rights, titles or interests in the properties referred to above in respect of which no claim had been made. The land in suit was included in the list and the Committee having been duly constituted was entitled to the possession thereof. This suit was instituted in pursuance of a resolution of the Committee dated 4th August 1938, by which Sardar Dewan Singh was authorized to institute and prosecute the suit.

Before proceeding further, it may be remarked that about half of the land in suit is in possession of Gurmukh Singh and that the remaining land was owned by Hardit Singh, but part of it was mortgaged by him to defendants 4 to 7 on 7th March 1927, and part of it was mortgaged to defendants 8 to 10 on 5th May 1927. Later, on 22nd May 1928, he sold the entire area in suit including the mortgaged land to Megh Singh for Rs. 17,200. A mutation relating to this transaction was attested on 30th June 1928. It may also be observed that the petition under sub-s. (1) of s. 7, Gurdwaras Act, was made on 1st November 1926, that the notification under sub-s. (3) of s. 7 was issued on 31st August 1928, and that notices to interested persons were issued on 9th September 1928.

It is obvious that neither the mortgagees nor Megh Singh could be mentioned in the list attached to the petition and, consequently, no notices were issued to them. The notice issued to Hardit Singh was served on him personally, but the notice issued to Gurmukh Singh purports to have been received by one of his sons, Rup Singh. It is admitted that no petition under s. 10 was presented on behalf either of Hardit Singh or of Gurmukh Singh.

Gurmukh Singh resisted the suit principally on the ground that he had no knowledge of the notification relied upon by the Committee nor did he ever come to know that his property was included in the list. He was absent from Qadirabad long before the notice in question reached his village and did not return to his village for some time afterwards. Neither he nor his ancestors had any connexion with the alleged Gurdwara, and the property in suit was his private property. He consequently prayed that action may be taken under s. 30(ii), Sikh Gurdwaras Act. Megh Singh pleaded that he had purchased the property in suit from Hardit Singh in 1928 for Rs. 17,200, that he had received no notice from the Government, that he lived at Nehranwala about 40 miles away from Qadirabad, that even by the exercise of reasonable diligence he could not come to know that any right, title or interest in respect of his private land was being claimed and that consequently no decree should be made against him. Baga Singh and others, defendants 4 to 7 and Sundar Singh and others, defendants 8 to 10, too put in similar pleas. The Committee of Management made replies to the pleas of the defendants on the lines already indicated in their plaint. On the pleadings of the parties, the following issues were framed :

1. (a) Can the defendants in this case claim the benefit of the first proviso to S. 30(ii), Sikh Gurdwaras Act ? (O. P. on the defendants). (b) If so, are they entitled to the benefit of the said proviso ? (O. P. on the defendants).

2. If the Court finds on issue No. 1 in favour of the defendants, cannot this Court proceed with the case, and should the question of title in that case be referred for the decision of the Sikh Gurdwaras Tribunal, under S. 32 of the Act ? (O. P. on the defendants).

3. (a) Whether the plea of the Government Notification in question being ultra vires can be entertained in this case ? (O. P. on the defendants).

3. (b) If so, was the Notification ultra vires and what is its effect on the case ? (O. P. on the defendants).

4. (a) Is the suit not maintainable against defendants 3 to 10, because of their being bona fide transferees for valuable consideration ? (O. P. on the defendants). (b) Can the defendants raise the

a above question in these proceedings? (O. P. on the defendants).

5. Was there a valid meeting of the plaintiff committee, and was Diwan Singh duly authorized by a resolution of the committee to institute the suit on behalf of the plaintiff? (O. P. on the plaintiff).

b The defendants other than Gurbakhsh Singh examined 13 witnesses in support of their contentions while Gurbakhsh Singh appeared as his own witness. Harnam Das, D. W. 1, referred to an application dated 28th October 1935, made by Gurmukh Singh in the course of the proceedings on a petition put in by Bahal Singh and others. In this application he asked to be impleaded as a party in Bahal Singh's petition, but the application was dismissed. Shingara Singh, D. W. 2, a clerk in the office of the Secretary to the Punjab Government produced certain documents as well as the postal acknowledgment; one of which purported to have been signed by Rup Singh, a son of Gurmukh Singh. Gurbakhsh Singh, D. W. 3, Arjan Singh, D. W. 4, Mahna Singh, D. W. 5, and Nihal Singh, D. W. 6, all deposed to the absence of Gurmukh Singh from Qadirabad some three months prior to the date when the notices were received in the village and to his return about more than a year afterwards some of them further stated that c Megh Singh was a resident of Nehranwala and that he seldom resided in the village of Qadirabad. It was, however, admitted that one Hukman Singh worked for Megh Singh at Qadirabad. Besides these witnesses, Sunam Ram, D. W. 9, Tola Ram, D. W. 10, and Sant Kahan Singh, D. W. 11, all belonging to Phulra in the State of Bahawalpur, were produced to state that Gurmukh Singh resided in those days at Phulra. Rup Singh was examined as D. W. 7 and he disowned the signatures attributed to him and further corroborated the story of his father's absence from the village at the time when the notices are alleged to have been received. d Gurmukh Singh, Megh Singh and Gurbakhsh Singh appeared as their own witnesses. Gurbakhsh Singh supported the story of the plaintiff in so far as the signatures of Rup Singh on the postal acknowledgment were concerned.

The plaintiff, on the other hand, examined Kishen Singh, P. W. 1 and Buta Singh, P. W. 2, in connexion with the resolution of the committee and Jaimal Singh, P. W. 3, and Partap Singh, P. W. 4, in respect of other matters. Jaimal Singh, who is a Patwari of Halqa Jethpur and in whose circle Qadirabad is situate, produced certain

4 khasra girdawaris wherein certain rectangles were shown as khudkasht of Gurmukh Singh; and Partap Singh, a Sarbarah Lam-bardar of the village, stated that Gurmukh Singh had never been absent from Qadirabad, and that he had personally received the notice issued by the Government.

On going through the evidence on the record, I have no hesitation in holding that the evidence led by the defendants is more reliable than the evidence relied upon by the plaintiff. The only two material witnesses in connexion with the main point in issue as to the knowledge or otherwise of Gurmukh Singh and Megh Singh are Jaimal Singh and Partap Singh. Jaimal Singh f joined the circle in March 1935, that is, about more than a year and a half after the material date and he could not, therefore, possess any personal knowledge about the matter in issue. The mere entry of khudkasht in khasra girdawaris is inconclusive, as khudkasht does not only mean cultivation by the person himself but also includes cultivation through his servants and associates. Partap Singh has admitted that some time prior to the date on which he appeared as a witness Kundan Singh, another son of Gurmukh Singh, had given evidence against him in a criminal case at the instance of g some of his enemies and further that the committee had entered into a compromise with him in relation to his own land. Gurbakhsh Singh, D. W. 14, is a relation of Partap Singh, and his evidence too is suspicious on that account. Further, he has admitted that he was in communication with the plaintiff before he appeared in the witness box.

The story of Gurmukh Singh's absence receives support from the fact that the notice was admittedly not served on him. Rup Singh has denied on solemn affirmation that the signatures were his, and if it be permissible to rely on one's own observation, h I am inclined to think that his signatures are materially different from those which appear in a bahi produced by Gurbakhsh Singh, D. W. 14, at the instance of the plaintiff. It is further unbelievable that Gurmukh Singh would have kept quiet over the matter, especially when all his other relations had taken proper steps under the Act. Under s. 30 (ii), Gurmukh Singh had to show that he had no knowledge of the fact that the right, title or interest had been included in the list published under sub-s. (8) of s. 7 and could not by the exercise of reasonable diligence have come to know of the fact that

a such right, title or interest was so included and on the record, as it stands, I am inclined to hold that he has succeeded in showing that it was so. A person who is absent at the time when the notices are served cannot be said to have any knowledge of the fact to which the notices relate and if a person is absent altogether from the place where the notices are issued, how can it be expected from him to exercise any reasonable diligence to acquire knowledge of the facts which are not even remotely present to his mind. This is all the more so when it is remembered that the property which was in possession of Gurmukh Singh and was claimed b on behalf of the Gurdwara had absolutely no connexion whatever with the Gurdwara and Gurmukh Singh could never imagine that any claim could be put forward to that property.

Coming now to Megh Singh's case, as stated above, his acquisition took place in 1928 and since then he had been enjoying the possession of his land without let or hindrance. He lived at a distance of about 40 miles from this village and his affairs at Qadirabad were looked after by Hukman Singh. It is not at all alleged that he was present at the time when the notices were received at Qadirabad and thus Hukman Singh could not be put on his guard seeing that the property was altogether unconnected with the Gurdwara. It is true that Hardit Singh was personally served, but he had no interest in the matter and his knowledge could not be fixed on Megh Singh. In his case too, it is not difficult to hold that even by exercise of due diligence he could not be aware of the fact that the property purchased by him from Hardit Singh had been claimed on behalf of the Gurdwara.

c Counsel for the parties have referred to certain judgments of this Court delivered under this section, but, in my view, in such cases the circumstances of each case, as it arises, are to be considered and no precedent can serve as a safe guide in the matter. I would hold, therefore, that the case of both Gurmukh Singh and Megh Singh is covered by S. 30 (ii), Sikh Gurdwaras Act.

d No arguments have been addressed to us on issues 3 and 4. On issue 5, it was contended that inasmuch as notice of the meeting of the committee had not been properly circulated, the committee was not properly constituted at the time Diwan Singh was authorized to institute and prosecute this suit. In my view, there is no force in this contention. Section 145, Gurdwaras Act,

clearly lays down that no act of a committee shall be held invalid in any judicial proceeding on the ground of any defect in the constitution of the committee or on account of any irregularity in the procedure of the committee, unless the defect or irregularity has occasioned a failure of justice. In the first place, I am not convinced that the meeting was convened in an irregular manner. But even if it was so convened, counsel for the appellants has failed to point out how that irregularity or defect has occasioned a failure of justice. The defect, if any, therefore, is condoned by S. 145 and the suit cannot be dismissed on that ground.

The decision on issue 1, however, does not f set the matter at rest. It still remains to consider what order should be made in the circumstances mentioned above. At the hearing it was assumed that the case will be referred to the Gurdwaras Tribunal under S. 32, Gurdwaras Act, and no arguments were addressed on that matter. In my view, however, the point is not so simple as it appears to be at first sight, as is evident from my dissenting judgment in a Full Bench case reported in 40 P L R 319¹ at p. 398. I would, therefore, suggest that fresh arguments be heard on that question.

Tek Chand J. — I agree. g

ORDER OF REFERENCE BY DIVISION BENCH TO FULL BENCH

Din Mohammad J. — The question that was referred for further consideration on the last hearing was whether S. 32, Gurdwaras Act, comes into play if in a suit instituted under S. 28, Gurdwaras Act, it is found that the person claiming a right, title or interest in any property belonging to the Gurdwara had no knowledge of the fact that such right, title or interest had been included in a list published under the provisions of sub-s. (3) of S. 7, and could not by the exercise of reasonable diligence have come to know of the fact that such right, title or interest was so included. Reliance in this connexion is placed on S. 32, Sikh Gurdwaras Act, but in my view that section is inapplicable to the facts of the present case. The material portion of S. 32 reads as follows :

Where in any suit or proceeding pending at the commencement of this Act or instituted after its commencement, in a civil or revenue Court, it has become or becomes necessary to decide any claim in connexion with a Notified Sikh Gurdwara which the Court finds might be made under the provisions

1. (38) 25 AIR 1938 Lah 369 : 175 I C 945 : 40 P L R 319 (F B), *Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar*.

^a of Ss. 3, 5, 6, 7, 10, 11, 19, 20, 21 or 27, within the time prescribed therein, the Court shall frame an issue in respect of such claim and shall forward the record of the suit or proceeding to a tribunal.

As I read this section, it applies to two kinds of suits or proceedings: (a) those that were pending at the commencement of the Act; and (b) those that were instituted after its commencement; and in relation to which the Court has to decide any claim which can be made under the sections referred to therein within the time prescribed. Consequently, it does not apply to such suits in which the limitation for presenting the claim has expired. I am strengthened in my conclusion ^b by a reference to the language used in S. 30, Gurdwaras Act. As would appear from its opening sentence, that section, too, applies to any suit or proceeding instituted in any civil or revenue Court after the commencement of the Act. In cl. (i) while referring to any claim made to any right, title or interest in any property belonging to a Notified Sikh Gurdwara, the words used are: and the Court finds that such claim might have been made in a list forwarded to the Provincial Government under the provisions of sub-s. (1) of S. 3 or of sub-s. (2) of S. 7 and that no such claim was duly made within time.

Similarly, in cl. (ii) while referring to any right claimed for any person in connexion ^c with a Notified Sikh Gurdwara, the words used are: and the Court finds that the right might have been made the subject of a claim in a petition. . . . and that no such claim was duly made within time.

Comparing the language of this section with that of S. 32, it is obvious that not only the words "might have been made" are not used in S. 32, but the further condition that no such claim was duly made within time has also been omitted. In other words, if the words "might be made" as used in S. 32 would have carried the same meaning as might have been made" as used in S. 30, we would have expected the Legislature to add ^d a further provision that no such claim was duly made within time, and inasmuch as this has not been done, the words "might be made" can only be interpreted as "might be made" in their plain grammatical sense and not as "might have been made." Further, if all suits or proceedings instituted after the commencement of the Act had already been provided for in S. 30, it was not necessary to make a further provision about those suits in S. 32. Moreover, if it was the intention of the Legislature to refer the suits provided for in S. 30 to the Gurdwaras Tribunal, it could have added a provision in the section itself to the effect that the record of

the suit or proceeding shall be forwarded to the tribunal. On the other hand, we find that ^e so far as such cases are concerned, which are dealt with in the substantive parts of cls. (i) and (ii) of S. 30, the Court is fully invested with the power of deciding against the Gurdwara in cl. (i) and against the claimant in cl. (ii). In the two provisos attached to these two clauses what is said is that the Court need not decide against the Gurdwara or against the claimant, as the case may be in the circumstances mentioned in the provisos. This, in my view, implies that the power to decide is vested in the Court itself and that in such cases it is not necessary to forward the suit or proceeding to a tribunal. I am ^f aware of the fact that this view runs counter to the view already taken in this Court in respect of this matter and that I myself was a party to one of those decisions. But with all respect, I submit that there was no considered decision on the point at issue in those cases, as it was not argued by counsel of the parties concerned.

Counsel for the respondent concedes that if the words "might be made" are literally interpreted, the view taken by me in 40 P.L.R. 319¹ at p. 398 may not be open to any objection, but he contends that that interpretation would lead to anomalous results in ^g so far as the questions relating to the Gurdwaras and the property attached thereto would be entertainable in civil Courts, although the whole scheme of the Gurdwaras Act was to exclude them from their jurisdiction. Moreover, cases that could be instituted within 90 days of the material time would be triable by a tribunal, while those instituted after the expiry of 90 days would be triable by an ordinary civil Court. He accordingly urges that the words "might be made" be interpreted as "might have been made" in order to give effect to the intention of the Legislature in framing the Sikh Gurdwaras Act. ^h I do not agree. Firstly, it cannot be said that the Legislature really did intend to exclude such cases as are dealt with under the proviso to S. 30 (i) and (ii) from the jurisdiction of the ordinary civil or revenue Courts, as the Sikh Gurdwaras Tribunal was not a permanent Court and could not be expected to exist for all times. Secondly, in the words of Jarvis C. J., as reproduced in Broom's Legal Maxims at p. 885, if the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it leads in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume

the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning.

In Civil Revision No. 549 of 1939 Bhide J. has also expressed an opinion that the question of the interpretation of S. 32, is not free from difficulty and has recommended that it should be referred to a Division Bench or to a Full Bench if the Division Bench so directs. I would make a similar recommendation in this case in view of the importance of the question involved and frame the following question for reference to a Full Bench : "Whether S. 32, Sikh Gurdwaras Act, applies to cases covered by the proviso to S. 30 (i) or the proviso to S. 30 (ii) ?"

Tek Chand J. — I agree that this point be heard by a Full Bench.

Opinion of the Full Bench

Bhide J. — The material facts relevant to the question of law which has been referred to this Full Bench are the following. In a petition filed under S. 7, Sikh Gurdwaras Act, certain properties including the land now in dispute, were claimed to belong to a Gurdwara known as Gurdwara Bhai Sewa Singh situated at Qadirabad in the Montgomery District. No counter-petition was presented during the prescribed period under S. 10 of the Act claiming the property now in dispute and as a result a notification to that effect was issued under sub-s. (3) of that section. Subsequently, the Gurdwara having been notified as a Sikh Gurdwara the Local Committee appointed to manage its affairs instituted a suit for possession of the aforesaid property, under S. 28 of the Act against the defendants who were in possession and claimed to be owners or mortgagees thereof. The trial Court decreed the suit, holding that the defendants had failed to prove that they had no knowledge of the claim made on behalf of the Gurdwara in the petition under S. 7 of the Act and that as they did not put forward their claim within the prescribed period in a petition under S. 10 of the Act, the plaintiff committee was entitled to a decree according to the provisions of S. 30 of the Act. From this decision an appeal was presented to this Court which came up for hearing before a Division Bench. The Division Bench found that out of the defendants, Gurmukh Singh and Megh Singh had proved that they had no knowledge that the property now in dispute had been claimed on behalf of the Gurdwara in the petition under S. 7 and could not even by the exercise of

reasonable diligence have come to know of the claim made on behalf of the Gurdwara.

On this finding it became necessary to decide whether the property in question belonged to Gurdwara Bhai Sewa Singh or to these defendants. On behalf of the plaintiffs, it was contended that this issue could only be tried by a tribunal appointed under the Sikh Gurdwaras Act and that it should be forwarded to such tribunal according to the provisions of S. 32 of the Act. The defendants on the other hand contended that S. 32 was inapplicable and that the issue could be tried by the civil Court. The plaintiffs relied in support of their contention on two Division Bench rulings of this Court reported in 15 Lah 66² and A I R 1935 Lah 843,³ but the question of law involved was not discussed in these rulings and it seems to have been assumed that S. 32 was also applicable to cases falling under S. 30. The correctness of these decisions had been doubted by my learned brother Din Mohammad J. in 40 P L R 319¹ at p. 398 and the Division Bench being of opinion that the point was not free from difficulty, the following question was referred to a Full Bench :

Whether S. 32, Sikh Gurdwaras Act, applies to cases covered by the proviso to a S. 30(i) or the proviso to S. 30(ii)?

The decision of the above question depends primarily on the language of Ss. 30 and 32. These sections are as follows :

30. At any time after the commencement of this Act in any suit or proceeding instituted in any civil or revenue Court —

(i) if any claim is made that any right, title or interest in any property belongs to a notified Sikh Gurdwara and the Court finds that such claim might have been made in a list forwarded to the Provincial Government under the provisions of sub-s. (1) of S. (3) or of sub-s. (2) of S. 7 and that no such claim was duly made within time, the Court shall decide such claim against the guardian on behalf of which the claim is made. Provided that the Court need not so decide, if it is satisfied that the failure to make the claim was owing to the fact that no person who forwarded or joined in forwarding a list had knowledge of the existence of the right, title or interest that might have been so claimed and that no such person could by the exercise of reasonable diligence, have come to know of the existence of such right, title or interest;

(ii) if any right is claimed for any person in connexion with a notified Sikh Gurdwara and the Court finds that the right might have been made the subject of a claim in a petition forwarded to the Provincial Government under the provisions of Ss. 5, 6, 10 or 11 or presented to a tribunal under

2. (1934) 21 A I R 1934 Lah 390 : 151 I O 890 : 15 Lah 66 : 36 P L R 426, Bishna v. Committee of Gurdwara Sudhal.

3. (1935) 22 A I R 1935 Lah 843 : 160 I O 138, Managing Committee Gurdwara Harijan Belan v. Partap Singh.

the provisions of Ss. 19, 20, 21 or 27 and that no such claim was duly made within time, the Court shall decide the claim, against the person claiming the right.

Provided that in the case of a claim that might have been made under the provisions of S. 5 or S. 10, the Court need not so decide, if it is satisfied that the failure to make the claim was owing to the fact that the person who might have made the claim either had no knowledge of the existence of the right, title or interest that he might have so claimed or had no knowledge of the fact that the right, title or interest had been included in a list published under the provisions of sub-s. (2) of S. 3 or of sub-s. (3) of S. 7 and could not, by the exercise of reasonable diligence, have come to know of the existence of such right, title or interest, or of the fact that such right, title or interest was so included:

Provided further that in the case of a claim by a past or present office-holder or any person deriving title subsequent to the first day of January 1920, from such office-holder, minority or insanity shall not, by itself, be deemed a valid reason for not having such knowledge.

32. (1) where in any suit or proceeding pending at the commencement of this Act or instituted after its commencement, in a civil or revenue Court, it has become or becomes necessary to decide any claim in connexion with a Notified Sikh Gurdwara which the Court finds might be made under the provisions of Ss. 3, 5, 6, 7, 10, 11, 19, 20, 21, or 27 within the time prescribed therein, the Court shall frame an issue in respect of such claim and shall forward the record of the suit or proceeding to a tribunal.

(2) On receiving a record forwarded to it under the provisions of sub-s. (1), the tribunal shall proceed to hear and determine the issue and record its decision in the form of an order and shall return the record with a copy of its decision to the Court and the Court shall proceed to determine the suit or proceeding in accordance with such decision subject to the provisions of Section 34.

It is not disputed that the present suit falls under S. 30. The suit was instituted after the commencement of the Sikh Gurdwaras Act and the property in question was claimed on behalf of a Notified Gurdwara. The defendants had admittedly failed to present any petition under S. 10 of the Act, in support of their claim. In such circumstances, the Court would have been bound to decide the claim put forward by the defendants against them under cl. (ii) of S. 30; but it has been now found by the Division Bench that two of the defendants at any rate had no knowledge of the claim made on behalf of the Gurdwara in the petition under S. 7 and that they could not have had such knowledge even by the exercise of reasonable diligence. In view of this finding, the proviso 1 to cl. (ii) of S. 10 comes into operation, and according to that proviso the Court need not decide the claim against the person concerned in such circumstances. The section does not however say that in these circumstances, the Court

should refer the issues arising between the Notified Sikh Gurdwara and the claimant to a tribunal appointed under the Sikh Gurdwaras Act. The presumption therefore is that the Court in which the suit is instituted is competent to dispose of the issue. If it was intended that such issue should be tried only by a tribunal, as is contended on behalf of plaintiffs, one would have certainly expected to find a provision to that effect in the section itself. But no such provision is made in the section. It is however contended on behalf of the plaintiffs, that S. 32 is supplementary to S. 30 and that the necessary provision for a reference of such issue to a tribunal is to be found in S. 32. This contention seems to me to be opposed to the language of S. 32. That section applies only when it has become or becomes necessary to decide any claim in connexion with a Notified Sikh Gurdwara, which the Court finds might be made under the provisions of Ss. 3, 5, 6, 7, 10, 11, 19, 20, 21 or 27, within the time prescribed therein.

The words "might be made" and the words "within the time prescribed therein" occurring in this section are important and significant. The words "might be made" indicate that the possibility of making a claim still exists. The possibility would exist only so long as the period for making the claim as prescribed by the Act has not expired. This is therefore made clear by adding the words "within the time prescribed therein." If the section were intended to apply to those cases also where the claim is not made within the prescribed period, the words 'might have been made' and not 'might be made' would have been appropriate. It is noteworthy that in S. 30 the words "might have been made" have been used so as to make it clear that that section applies only when a claim might have been made, but was not made within the prescribed period.

A comparison of the language and the subject-matter of Ss. 30 and 32 appears to me to leave no doubt that S. 32 was intended to apply only to those cases, which were instituted either (i) before the commencement of the Act, or (ii) which were instituted after the commencement of the Act, but before the expiry of the prescribed period of limitation for making a claim under the various sections referred to therein. Section 30 applies, on the other hand, to cases where a claim might have been made but was not made within the prescribed period. The provisions of S. 30 show that if a person fails to make a claim within the prescribed period, as required by the Act, he runs the risk of the claim being summarily dismissed if it is

put forward in a civil or a revenue Court at a later stage, and that the claim will not be tried on merits at all, unless the claimant proves that his failure to put forward the claim within the prescribed period was due to the fact that he had no knowledge of the claim made on behalf of the Gurdwara and could not have obtained such knowledge even by the exercise of due diligence. In other words, it is only in these exceptional circumstances that the claim will be tried on merits in a suit falling under S. 30. Section 32, on the other hand, makes no reference at all to any such circumstances. The obvious explanation is that S. 32 applies only when the time for making a claim has not yet expired and consequently no question of the knowledge of the claimant or his exercise of reasonable diligence can arise under that section. All that S. 32 requires is that when any issue arises in a pending suit with reference to a claim which could be made in a petition under the various sections referred to therein, and the prescribed period of limitation for such claim has not yet expired the Court should refer the issue to a tribunal so as to avoid the necessity of the claimant having to file a separate petition for the purpose.

The learned counsel for the plaintiffs has contended that according to the scheme of the Sikh Gurdwaras Act all questions relating to the 'right, title and interest' of a Notified Gurdwara must be tried by a tribunal appointed under the Act and it would be anomalous, if claims preferred within the prescribed period have to be tried by a tribunal while claims preferred after that period can be disposed of by an ordinary civil or revenue Court. It has been, however, pointed out above that it is only in very exceptional circumstances that a civil or revenue Court will have jurisdiction to try such issues under S. 30. According to the scheme of the Act, all claims relating to 'right, title or interest' in the immovable property claimed on behalf of a Notified Sikh Gurdwara had to be made within a short period of limitation and all the claims so made were to be disposed of by the tribunal. But the tribunals under the Act, were apparently intended to be constituted as a temporary measure and it was, therefore, probably considered necessary to leave the trial of issues arising in the exceptional circumstances referred to above to ordinary Courts.

The contention of the learned counsel for the plaintiffs that according to the scheme of the Act all claims relating to right, title

and interest in property belonging to a Notified Gurdwara must invariably be tried by a Tribunal is not supported even by the provisions of S. 23 of the Act, under which the present suit was instituted. That section requires suits for possession of property claimed on behalf of a Gurdwara to be instituted in the principal Court of civil jurisdiction in certain circumstances. If the intention of the Legislature was that claims to property belonging to a Notified Gurdwara should always be tried by a Tribunal, the Legislature would not have allowed such suits to be instituted in the principal civil Court of original jurisdiction. After carefully considering the provisions of Ss. 23, 30 and 32, Sikh Gurdwaras Act, I am not satisfied that the Legislature intended that issues falling within the purview of the provisos to cls. (i) and (ii) of S. 30 of the Act should be tried by a tribunal under the Act. It is true that there are certain points of difference in the procedure before the Tribunal and the procedure in ordinary civil or revenue Court; but as pointed out above, it is only in a very few exceptional cases falling under the provisos to S. 30 that the decision would be left to ordinary Courts. As the tribunals appointed under the Act were not intended to be permanent, this was probably considered inevitable. If the intention of the Legislature was otherwise, all that can be said is that the intention does not appear to have been carried out by the language used in Ss. 30 and 32. It is well-settled that the primary test for the interpretation of a statute is the language used therein. When the words used in a statute are plain and unambiguous and admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature and to construe them according to its own notions of what ought to have been enacted. To depart from the plain language used on account of such notions is in reality not to interpret the law but to alter it: (*see* Maxwell on Interpretation of Statutes, Edn. 7, pp. 5 and 6.) If, indeed there is any lacuna left in the Act, it is for the Legislature to intervene and amend the Act in such manner as may be expedient. For reasons given above, I would answer the question referred to the Full Bench in the negative.

Tek Chand J. — I agree.

Din Mohammad J. — I agree.

G.N./B.K.

Answer accordingly.

(29) A. I. R. 1942 Lahore 27

TEK CHAND J.

Mangta — Defendant — Appellant

v.

Mangat (minor) through Surta, Plaintiff and others, Defendants

— Respondents.

Second Appeal No. 1470 of 1940, Decided on 10th October 1941, from order of Dist. Judge, Karnal, D/ 3rd May 1940.

Custom (Punjab) — Succession — Barbers of District Karnal—Collaterals — Right of representation — Strict rule of Mitakshara is not followed among high caste Hindus of Rohtak, Karnal and Gurgaon Districts in Punjab — Right of representation in collateral succession prevails among barbers of Karnal District — Nephew succeeds along with uncle to deceased collateral's property.

The strict Mitakshara rule of representation in matters of succession is not followed among high-caste Hindu tribes of the districts of the Rohtak, Karnal and Gurgaon, where a nephew succeeds along with the uncle to the property of the deceased collateral : 71 P R 1882; 39 P R 1884 and ('37) 24 A I R 1937 Lah 710, *Rel. on* ; 140 P R 1908, *Referred*. [P 286]

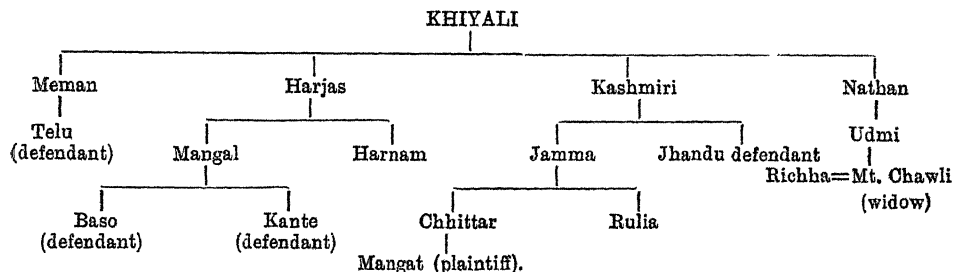
The right of representation in collateral succession prevails among the barbers of Karnal District where a grand nephew can succeed along with his grand uncle to the property of a deceased collateral.

[P 27h; P 28b]

Qabul Chand Mital — for Appellant.

D. N. Aggarwal — for Respondent (Plaintiff).

Judgment.—The parties in this case are barbers of mauza Agaundh, District Karnal, and their relationship will appear from the following pedigree table :



The property in dispute is a house which originally belonged to Richha who died childless some years ago leaving a widow Mt. Chawli. On the death of Mt. Chawli the house was taken possession of by Mangta son of Bakhtawar, brother of Mt. Chawli, alleging that she had adopted him and had also made a will bequeathing the house to him. A suit was instituted by Jhandu, Rulia and Chhittar sons of Jamma, and Baso and Kante sons of Mangal, against Mangta nephew of Mt. Chawli, for possession of two-thirds of the house. In that suit, a decree was granted by the Subordinate Judge on 13th August 1937 in favour of the then plaintiffs against Mangta. Mangta appealed to the Senior Subordinate Judge and it was found that Rulia and Chhittar sons of Jamma had died before the institution of the suit and therefore no decree for their shares could have been passed in their favour. The learned Senior Subordinate Judge accordingly dismissed the suit relating to their one-sixth share, and passed a decree in favour of Jhandu for one-sixth, and Baso and Kante for one-third share of the house. The decision of the Senior Subordinate Judge is dated 24th May 1938. Subsequently Mangat son of Chhittar deceased instituted the present suit against Mangta son of Bakhtawar for recovery of his one-sixth share of the house.

He alleged that he, as the sole surviving descendant of Jamma, was entitled, with Jhandu, Baso, Kante and Telu, to succeed to the house left by Richha and, therefore, he claimed that a decree for one-sixth of the house be passed in his favour. To this suit Jhandu, Baso, Kante and Telu were impleaded as pro forma defendants.

The suit was resisted by Mangta son of Bakhtawar on various grounds, of which those material for our present purposes are that he had been adopted by Mt. Chawli and she had made a will in his favour in 1926 and, secondly, that Mangat plaintiff was not entitled to succeed to the property of Richha in the presence of his grand-uncle Jhandu the right of representation in collateral succession not being recognized under Hindu law. The Courts below have concurrently found that Mt. Chawli had no power to bequeath her husband's property to her brother's nephew Mangta, appellant and that Mangta had not been validly adopted by her. They further found that the right of representation in collateral succession exists among the barbers of Karnal district. They have, accordingly, granted the plaintiff a decree for one-sixth of the house.

On second appeal, the only point argued is that Mangat plaintiff was not entitled to succeed to the property of Richha in the

presence of Jhandu. After hearing Mr. Qabul Chand, I see no force in this contention. Jhandu who, as already stated, is a pro forma defendant in this case, does not contest the plaintiff's right to succeed along with him to the property of Richha. It is also significant that in the previous case he claimed one-sixth share only, and not one-third as he should have done if the strict rule of Hindu law were applicable. The decree granted to Jhandu by the Senior Subordinate Judge in the previous case was also for one-sixth share. Further, if the contention of the appellant were correct, Baso and Kante would not be entitled to succeed to Richha in the presence of Jhandu but they successfully claimed one-third share in the house in the previous litigation and Jhandu did not raise any objection to their claim. The oral evidence in the case also supports the plaintiff-respondent's contention that the right of representation in collateral succession does prevail in the tribe. It may also be mentioned that the strict rule of the Mitakshara is not followed among high-caste Hindu tribes of the districts of Rohtak, Karnal and Gurgaon, where a nephew succeeds along with the uncle to the property of a deceased collateral: 71 P R 1882,¹ 39 P R 1884² and A I R 1937 Lah 710.³ In this connexion, reference may also be made to 140 P R 1908⁴ at p. 645, where Lal Chand J. after a review of the authorities observed that the customary rule of representation has been found by judicial inquiry as well as experience to prevail generally throughout the province among agriculturists as well as non-agriculturists, whenever the matter was disputed and not a single case to the contrary is traceable or was quoted. The presumption therefore might be that a custom so generally prevalent was also followed by the parties to the present case.

The decision of the lower Courts therefore is correct. The appeal fails and is dismissed with costs.

d G.N./R.K. *Appeal dismissed.*

1. ('82) 71 P R 1882, Adjudhia Pershad v. Dwarka Das.
2. ('84) 39 P R 1884, Kanhya Lal v. Krishna.
3. ('37) 24 A I R 1937 Lah 710 : 175 I C 542 : 39 P L R 912, Kahni Ram v. Molar.
4. ('08) 140 P R 1908 : 68 P W R 1907, Mehtab-ud-din v. Abdullah.

(29) A. I. R. 1942 Lahore 28

DALIP SINGH AND BHIDE JJ.

Johri Lal through Babu Ram —

Defendant — Appellant
v.

Dhani Ram, Plaintiff and others,
Defendants — Respondents.

Second Appeal No. 186 of 1939, Decided on 8th October 1941, from decree of Addl. Dist. Judge, Hissar, D/- 10th December 1939.

(a) Punjab Municipal Act (3 of 1911), S. 169 (g) — Question whether land is no longer required for public street is one of fact to be decided by Civil Court and not one of discretion of Municipal Committee.

Whether the land vests in the Municipal Committee or not is a question of fact and not a matter in the discretion of the Committee. Similarly, whether the land was used by the Committee for a public street or not is a question of fact and cannot be a question of the opinion of the Committee. The words "no longer required therefor" in S. 169 (g) are a qualification on the power conferred to lease by the Municipal Committee and are not a further power conferred on the Municipal Committee to decide at their discretion whether a street is or is not needed any longer for the public. The question whether a Committee has or has not acted within the powers conferred by the statute is one for the civil Courts to decide and, therefore, it is a question for the civil Court to decide whether the street was or was no longer required for the purposes of the public. [P 30b, c, d]

(b) Punjab Municipal Act (3 of 1911), S. 169 — Right to use public road is common law right—Municipal Committee cannot take away this right at its pure discretion in absence of clear statutory provision.

The right to use a public road is a common law right which every member of the public has. The Municipal Committee cannot be allowed to take away this right at its pure discretion in the absence of statutory provisions leaving in very clear terms, the private right of citizens entirely to the discretion of the Municipal Committee : ('20) 7 A I R 1920 Mad 808, *Rel. on.* [P 30c, d]

M. C. Mahajan and Qabul Chand Mittal —
for Appellant.

C. L. Aggarwal, D. D. Jain and Prem Chand Pandit — for Respondents 1 and 2.

Dalip Singh J.—The facts of this case so far as are necessary for the decision of this appeal are as follows. In 1931 a lease was given by the Municipal Committee to the defendant of a portion of land forming part of a public street. It appears that even previous to this lease the defendant had a thatched shed of unknown dimensions on a portion of the site at least. On 27th February 1932, the father of the defendants applied for a lease for ten years and for permission to build a pacca chabutra on the spot. The allegations were that the thatched shed was used by the defendants to feed poor persons, that as the vacant spot surrounding the

a thatched shed was used by passers-by as a urinal and so rendered insanitary it was not required for the purposes of public street and it will be more convenient to have the people fed sitting on a pacca chabutra until such time as they would be fed. On 28th March 1932, the Vice-President of the Municipal Committee reported in favour of the application. In the meantime two other applications were put in one supporting and one objecting to the lease. On 14th May 1932, the application objecting to the grant of the lease made by the predecessor-in-interest of the present plaintiff was rejected. The present plaintiff's predecessor had pleaded that the road had been unduly narrowed to the great detriment of public and of himself and that the vacant spots furnished a sanctuary for animals. On 15th May 1932, some other applications were put in supporting the defendant's application. On 17th May 1932, the Committee gave a lease for ten years and permission to build the chabutra to the defendant. The rent was fixed at Rs. 12-12-0 yearly and the lease was to run from 1st April 1932. It was ordered on the application of the objectors that the street was quite sufficiently wide for the purposes of public. On 31st May 1932, other applications were put in by various people objecting to the lease given to the defendant. On 1st June 1932, other applications were put in supporting the lease given to the defendant. On 19th June 1932, the Committee rejected all the objections to the lease.

On 18th August 1932 it appears that members of the Municipal Committee raised the objection that the land was nazul land and the matter should be referred to the Deputy Commissioner. The Deputy Commissioner forwarded it to the Municipal Committee for consideration and thereupon the Municipal Committee proceeded to serve a notice to the defendant to demolish his thara. It is not clear under what section this notice was given but the defendant immediately brought a suit for injunction to restrain the Municipal Committee from demolishing his thara or platform pointing out that the thara had been built with the consent of the Municipal Committee and that the site had been leased to him for ten years. This suit was decreed on 31st May 1933, the Committee confessing judgment and an injunction being granted as prayed for by the plaintiff against the Municipal Committee. On 9th May 1932, the present suit was brought by the plaintiff asking that the street should be restored and claiming that there has been an obstruction which injured both himself and the public.

The trial Court held that the street had undoubtedly been narrowed and the giving away of the site for purposes of a platform unnecessarily interfered with the rights of the public and also in particular interfered with the plaintiff's frontage and caused him inconvenience, that the Municipal Committee had not acted in any considered manner in allowing this, that the plaintiff need not prove special damages in the circumstances of the case as he complained of obstruction of a highway or public street and that even if special damages had to be proved the plaintiff had succeeded in proving special damages and, therefore, was entitled to an injunction. It accordingly decreed the suit. f

The appellate Court upheld the finding of the trial Court and held that whether the street was or was no longer required for the public was a question of fact to be decided by the Court and that the Municipal Committee even if it had any discretion in the matter had never really exercised its discretion and had taken up inconsistent positions which showed that its acts, if any, were arbitrary and capricious and no discretion had been exercised by it at all. It therefore dismissed the appeal.

The plaintiff came here in second appeal and the case was admitted on the ground g whether the delay in bringing the suit for injunction disentitled the plaintiff to the discretionary relief of a mandatory injunction demolishing the platform. At the time of the hearing another point appears to have been raised, namely, that under s. 169 (g), Municipal Act, the question whether a street was or was not required for the public was a matter entirely within the discretion of the Municipal Committee. The learned Judge hearing the case thought the point was of sufficient importance to be referred to a Division Bench. We have accordingly heard the whole appeal which was referred to the Division Bench by the Single Bench. h

The first point raised is that the delay in bringing the suit from 1932 to 1935 disentitled the plaintiff to the relief of a mandatory injunction. This point might have been of some importance but, in view of the present circumstances, it is now nothing but an academic point. The lease of the defendant was only for ten years and expires on 1st April 1942. There are thus only about six months left. The Municipal Committee by refusing to renew the lease would render the demolition of the platform obligatory. The learned counsel who appeared for the Muni-

principal Committee has read out the necessary resolution of the Municipal Committee on the subject in which the Municipal Committee by a majority are of opinion that a mistake had been made originally in granting the lease, that the judgments of the Courts below were perfectly correct in holding that the street had been unduly narrowed to the detriment of the public and of the plaintiff and that they fully uphold and endorse those judgments. In these circumstances to refuse the plaintiff the relief of demolition would be meaningless since in six months time the platform will evidently have to be demolished if the opinion of the Municipal Committee remains unchanged.

The second point urged was that under S. 169 (g) the discretion is left to the Municipal Committee as to whether the road is required for the public or not. It seems to me that the proper construction is totally different. The section reads as follows. "... or any land vesting in and used by the committee for a public street and no longer required therefor. . . ." (I omit the irrelevant portions of the sub-section). It is obvious that whether the land vests in the Committee or not is a question of fact and not a matter in the discretion of the Committee. Similarly, whether the land was used by the Committee for a public street or not is a question of fact and cannot be a question of the opinion of the Committee. In these circumstances it is difficult to see why the third qualification "and no longer required therefor" should be a mere question of the opinion of the Municipal Committee and not a question of fact to be determined by the Court. Apart from this it seems to me that the right to use a public road is a common law right which every member of the public has. To allow the Committee to take away this right at its pure discretion is a thing that will have to be provided for by the Legislature in very clear terms before it could be held that the private right of citizens have been left entirely to the discretion of the Municipal Committee. It is unnecessary to multiply rulings on this subject but 42 Mad 796¹ may be looked at in this connexion. I am, therefore, clearly of opinion that the words "no longer required therefor" are a qualification on the power conferred to lease by the Municipal Committee and are not a further power conferred on the Municipal Committee to decide at their discretion whether a street is or is not needed any longer.

1. (20) 7 AIR 1920 Mad 808 : 52 I C 921 : 42 Mad 796 : 37 M.L.J. 224, Rama Row v. Martha Sequeira.

for the public. The question whether a committee has or has not acted within the powers conferred by the statute is one that has obviously been always for the civil Courts to decide and, therefore, it is a question for the civil Court to decide whether the street was or was no longer required for the purposes of the public. The finding on this question appears to me in the circumstances of this case to be a finding of fact. Both the Courts below have concurred in holding that the rights of the public have been unduly infringed by narrowing the road to its present dimensions by the grant of the lease. In these circumstances I would dismiss this appeal. Having regard to all the facts of the case I would leave the parties to bear their own costs of this appeal.

Bhide J. — I agree.

G.N./R.K.

Appeal dismissed.

(29) A. I. R. 1942 Lahore 30

TEK CHAND J.

Firm Gandu Mal Charanji Lal through Charanji Lal — Plaintiff —
Petitioner

v.

Matu — Defendant — Respondent.

Civil Revn. Petn. No. 123 of 1941, Decided on 10th October 1941, for revision of decree of Judge, Small Cause Court, Lahore, D/- 25th January 1941.

Punjab Registration of Money-lenders' Act (3 of 1938), S. 2 (8) and S. 3—Advance of money without interest is not loan within S. 2 (8) — S. 3 does not apply — Suit for recovery of, cannot be dismissed under S. 3 for want of registration of money-lender.

Under S. 2 (8) in order to be a "loan" it is essential that the advance should be "at interest." An advance of money on which no interest is to be charged is not "loan" within the meaning of Sec. 2 (8) and therefore S. 3 is inapplicable. Consequently a suit for the recovery of such advance cannot be dismissed under S. 3, simply because the plaintiff was not registered as a money-lender or that he had not applied for registration or that he did not hold a valid licence. [P 31c,d]

F. C. Mital — for Petitioner.

Order. — The plaintiff instituted a suit against the defendant for recovery of Rs. 200 alleged to be due on a bahi account. It was alleged in the plaint that the defendant was a relation of the plaintiff and required money for carrying on his shop. He accordingly requested the plaintiff for help and the plaintiff advanced him Rs. 200 without interest. On 19th December 1937 the defendant took the money and made a note in the plaintiff's bahi but had not repaid the amount, in spite of demands. The plaintiff

a accordingly prayed that a decree for Rs. 200 be passed against the defendant. The defendant pleaded inter alia that the suit was not maintainable as the plaintiff was a money-lender and he had not produced a certificate of registration under the Punjab Registration of Money-lenders Act, 3 of 1938. The trial Judge framed a preliminary issue as to whether the plaintiff was a money-lender for the purpose of Punjab Registration of Money-lenders Act. After examining the plaintiff, he found this issue in the affirmative and proceeded to hold that the plaintiff had not so far applied for registration nor is he registered, nor does he hold a valid license and that the suit was not maintainable. He accordingly dismissed the suit leaving the parties to bear their own costs. The suit was evidently dismissed under S. 3 of Act 3 of 1938, the material portions of which are as follows :

Notwithstanding anything contained in any other enactment for the time being in force, a suit by a money-lender for the recovery of a loan shall, after the commencement of this Act, be dismissed, unless the money-lender at the time of the institution of the suit is registered or holds a valid license or holds a certificate from a Commissioner granted under section 2

In order to make this section applicable it is essential: (1) that the plaintiff is a money-lender, and (2) that the suit is for recovery of a "loan." The first condition is no doubt satisfied in this case as the plaintiff has been proved to be a money-lender, but the learned Judge has not considered whether the suit was for recovery of a "loan." In s. 2 (8) of the Act "loan" is defined as meaning an advance, whether secured or unsecured, of money or in kind at interest and shall include any transaction which the Court finds to be in substance a "loan." It will be seen that in order to be a "loan," it is essential that the advance should be "at interest."

a In the present case, it is stated in the plaint that the amount in dispute was advanced without interest. This is corroborated by the extract from the entry in the bahi, signed by the defendant. The defendant in his jawab-i-dawa did not allege that the advance carried interest, nor did he lead any evidence to show that there was any understanding that interest would be charged. In these circumstances it is clear that the advance in question was not a "loan" as defined in Act 3 of 1938. The provisions of S. 3 are therefore inapplicable and the suit could not be dismissed simply because the plaintiff was not registered as a money-lender or that he had

not applied for registration or that he did not hold a valid licence. I accept the petition, set aside the judgment and decree of the lower Court and remand the case to it for rehearing and decision of the other points involved in the case. The court-fee on this petition shall be refunded: other costs shall be costs in the cause.

G.N./R.K.

*Petition accepted.***(29) A. I. R. 1942 Lahore 31**

DALIP SINGH AND BHIDE JJ.

Mt. Rami and another — Defendants
— *Appellants*

v.

Gian Singh and another, Plaintiffs
and another, Defendant—*Respondents.*

Second Appeal No. 1033 of 1939, Decided on 2nd October 1941, from decree of Addl. District Judge, Lyallpur, D/ 14th April 1939.

(a) Custom—Proof—Riwaj-i-am—Judicial decisions cannot be ignored merely because they are of later dates than Riwaj-i-am—Value of decisions must be judged by materials on which they are based—Judicial decisions can be relied on without filing certified copies of same.

The English rule that 'a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary,' cannot be properly applied to customs in India. In the matter of proof of custom, it is not correct to ignore judicial decisions merely because they are of later dates than the riwaj-i-am. The value of such decisions must be judged on the basis of the materials on which they are based. For the purpose of relying upon the reported judicial decisions it is not necessary to place certified copies of the judgments on record : ('41) 28 A I R 1941 P C 21, *Rel. on*; ('37) 24 A I R 1937 Lah 451 (FB), *Not foll.* [P 32c,e]

(b) Custom (Punjab)—Bajwa Jats of Sialkot District—Non-ancestral property—Succession—Daughters exclude collaterals.

Among Bajwa Jats of the Sialkot District daughters succeed to non-ancestral property of a sonless proprietor in preference to his collaterals.

[P 31h; P 33a]

(c) Riwaj-i-am—Entries unsupported by instances—It is dangerous to lay too great stress on entries.

It is dangerous to lay too great a stress on entries in the riwaj-i-am when they are unsupported by instances. [P 33a]

J. L. Kapur and Ajit Ram — for Appellants.

H. L. Soni — for Respondents (Plaintiffs).

Bhide J.—The sole point for decision in this second appeal is whether the plaintiffs who are collaterals of one Wasawa Singh in the second degree are entitled according to custom to inherit his non-ancestral property in preference to his married daughters, Mt. Rami and Mt. Bisso. The parties are Bajwa Jats of the Sialkot District. The

^a Courts below, relying chiefly on the riwaj-i-am and rejecting the other evidence in view of the principles laid down in the Full Bench decision, 1 L R (1937) Lah 594,¹ have decreed the plaintiffs' suit. From this decision the defendants have preferred the present appeal. The learned counsel for the appellants conceded that the entries in the riwaj-i-am from the year 1865 to the latest riwaj-i-am of the year 1916 were in favour of the collaterals; but he contended that these entries did not state the custom governing the parties correctly. The oral as well as the documentary evidence produced in this case was meagre but the learned counsel for ² the appellants contended that there was a large number of decided cases in which it had been found by this Court, contrary to the statement in the riwaj-i-am, that daughters are entitled to succeed to the self-acquired property of their father in preference to his collaterals. The Courts below have disregarded the decisions relied on by the appellants on the ground that they were comparatively recent and not sufficient to rebut the presumption raised by the entries in the riwaj-i-am.

The learned counsel for the appellants pointed out that the principles laid down in this respect in the Full Bench case referred to above which the Courts below have followed, were not approved by their Lordships of the Privy Council in a recent decision reported in 1 L R (1941) Lah 154.² It was pointed out by their Lordships in that case that the English rule that 'a custom in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary,' cannot be properly applied to customs in India. It was further pointed out that judicial decisions even of comparatively recent dates may furnish valuable evidence of custom; for, such decisions may contain on their records ³ evidence of specific instances of sufficient antiquity to be of value in rebutting the presumption attaching to the entries in the riwaj-i-am. Their Lordships observed that in such cases the value of the decision arises not merely from the fact that it is relevant under Ss. 13 and 42, Evidence Act, as forming in itself a transaction by which the custom in question was recognized, etc., but from the fact that it contains on its records a

1. (37) 24 A I R 1937 Lah 451; 189 I C 909; 1 L R (1937) Lah 594; 39 P L R 349 (FB), Bahadur v. Mt. Nihal Kaur.
2. (41) 38 A I R 1941 P C 21; 193 I C 436; 1 L R (1941) Lah 154; 1 L R (1941) Kar P C 22 (PC), Mt. Subhani v. Nawab.

number of specific instances relating to the relevant custom. It would thus appear that it would not be correct to ignore judicial decisions merely because they are of later dates than the riwaj-i-am. The value of such decisions must be judged on the basis of the materials on which they are based.

The learned counsel for the appellants relied on a number of judicial decisions relating to the custom in question in the district of Sialkot to which the parties belong, namely 10 Lah 485,³ 10 Lah 489,⁴ 16 Lah 616,⁵ 16 Lah 985,⁶ A I R 1930 Lah 724⁷ and A I R 1935 Lah 106.⁸ Most of these cases relate to Jats and it was held in them on the evidence ^f in the shape of instances that the presumption attaching to the entries of the riwaj-i-am of the Sialkot District was rebutted and that according to the custom governing Jats daughters were entitled to inherit non-ancestral property in preference to collaterals. The case law on the subject was recently reviewed by a Division Bench of this Court in R. F. A. No. 446 of 1939⁸ in which the effect of the Privy Council ruling referred to above was also considered. That case also related to Bajwa Jats as the present one. It was held as well-settled that among Bajwa Jats of the Sialkot District daughters succeed to non-ancestral property ^g of a sonless proprietor in preference to his collaterals.

The learned counsel for the respondents conceded that if the judicial decisions referred to above are taken into consideration he could not support his clients' case but he contended that the judicial decisions could not be relied upon by the appellants as no certified copies of the judgments had been placed by them on the record. This contention, however, appears to have no force and the Privy Council ruling referred to, on which the learned counsel relied in this behalf, does not lend any support to it. That judgment itself discusses a number of reported cases of which apparently no certified

3. (29) 16 AIR 1929 Lah 58; 116 I C 189; 10 Lah 485; 30 P L R 678, Shahmad v. Mt. Muhammad Bibi.

4. (29) 16 AIR 1929 Lah 465; 118 I C 398; 10 Lah 489; 30 P L R 618, Said v. Mt. Said Bibi.

5. (35) 22 AIR 1935 Lah 106; 153 I C 194; 16 Lah 616; 37 P L R 732, Mangal Singh v. Mt. Indar Kaur.

6. (36) 23 AIR 1936 Lah 339; 161 I C 24; 16 Lah 985; 38 P L R 509, Mahi v. Mt. Barkate.

7. (30) 17 AIR 1930 Lah 724; 125 I C 609, Khuda Dad v. Mt. Rabia Bibi.

8. Reported in (42) 29 A I R 1942 Lah 1 (FB), Karam Dad v. Mt. Mohammad Bibi.

a copies had been placed on the record. Although the entries in the *riwaj-i-ams* relating to the custom in question ever since 1865 were in favour of the collaterals, these entries were not supported by any instances. It is remarkable that in spite of the entries in their favour, the collaterals in most of the decided cases could hardly produce any instances in support of the custom. In this case also, they have not been able to do so. Incidentally this shows the danger of laying too great a stress on entries in the *riwaj-i-am* when they are unsupported by instances. In view of the judicial decisions relied upon by the appellants, they are clearly entitled to succeed. I would accordingly accept this appeal and dismiss the plaintiffs' suit. In view of all the circumstances, however, I would leave the parties to bear their costs.

Dalip Singh J.—I agree.

G.N./R.K.

Appeal accepted.

A. I. R. (29) 1942 Lahore 33

BECKETT J.

Hafiz-ul-Rehman —

Convict — Appellant

v.

Emperor.

c Criminal Appeal No. 724 of 1941, Decided on 24th September 1941, from order of Sess. Judge, Lyallpur, D/- 10th May 1941.

Penal Code (1860), Ss. 302 and 97 — Police constable going to railway station premises to take precautions against commission of crimes prevalent in locality — Finding some beggars sleeping on ground he woke them up without use of force and found himself engaged in argument with one of beggars during course of which he was suddenly struck by the beggar on forehead with heavy implement — While reeling under effect of blow constable striking his assailant on head with hatchet purely in defence without any conscious intention beyond that — Beggar dying on spot — Constable's act in striking deceased held could hardly be called voluntary so as to render it criminal — Even otherwise accused held had made out good case of private defence.

d The police constable, in pursuance of what he supposed to be his duty, went out late at night to the railway station premises with a view to taking precautions against the commission of crimes which were prevalent in the locality. In the course of his inspection he found some beggars sleeping on the ground, and thought that it would probably be in the public interest if they went somewhere else. Having woken them up, not apparently by the use of any sort of force he found himself engaged in argument with one of them who was inclined to be truculent. While this was going on, without any warning, he suddenly found himself struck by the beggar on the forehead in the neighbourhood of eyebrow by a blow with an extremely heavy implement (pestle used for pounding of spices) and while he

was reeling under the effect of the blow given with the pestle, the constable struck the beggar with a hatchet on the head as a purely defensive measure, and probably without any conscious intention beyond that. The beggar died on the spot :

Held that since it was not proved beyond doubt that the constable was fully conscious of what he was doing, in view of the probable consequences of the injury above his eye, the act of the accused in hitting back the deceased with the hatchet could hardly be called voluntary in any sense so as to make it criminal. [P 35h]

Held further that a good case for the exercise of the right of private defence could be made out in favour of the accused even if he had acted with any conscious intention of inflicting an injury which was likely to result in death. [P 35g]

Dr. Tassadduque Hussain — for Appellant.

Abdul Aziz Khan for Advocate-General —

for the Crown.

Judgment.—The accused in this case is a police constable who has been found guilty of the offence of culpable homicide by causing the death of a beggar with a hatchet blow on the head and has been sentenced to rigorous imprisonment for seven years, on the ground that he acted under grave and sudden provocation. The prosecution story, as accepted by the Sessions Court, is that the accused was on special duty at a railway station when the offence occurred. In the course of his duty, he found a man of the faqir class sleeping in an open space on the station premises alongside three young children. He woke them up with some violence and told them to move away, as crimes had recently been committed in that locality. His order led to an argument with the beggar, who apparently believed that he and his companions were doing no harm, while the constable was acting in what he considered to be the usual highhanded manner of the police force. It may be observed that the constable was not in uniform at that time, but he had his uniform overcoat on, and it seems to have been made quite clear that he was a policeman on duty. He was also carrying a hatchet, the reason for which has not been explained. In the course of argument, the faqir lost his temper and suddenly hit the constable a blow on the head with a heavy stick which he had with him. On receiving this blow, the accused raised his hatchet, which struck the faqir on the forehead and caused his immediate death. The eldest of the children cried out and her cries brought some of the railway staff to the spot.

As the railway staff only came up after the occurrence was complete, the prosecution case is based almost entirely on the evidence of the child above mentioned, that

is, the daughter of the deceased, named Mt. Bawi, whose age is ten, and who has been able to give a fairly clear account of what occurred. The prosecution also produced a boy who was five years old but had to give him up. The decision of the Sessions Judge in this case is based mainly upon the evidence of Mt. Bawi and it is necessary to examine her evidence first before proceeding to discuss the legal aspect of the matter. The learned Sessions Judge took the view, for which there would appear to be a good deal of support at first sight, that the constable could not be said to have been acting in self-defence by hitting the beggar on the head with a weapon like a hatchet after receiving a blow with a stick on his own head, but that, as already mentioned, he had acted under grave and sudden provocation. In forming this view, the learned Sessions Judge appeared to have been greatly influenced by Mt. Bawi's account of the constable's earlier conduct, from which he had formed the impression that the constable was guilty of acting in a highhanded manner throughout, having kicked the young girl in order to wake her up and having seized the faqir by his hair and shaken him in an attempt to secure his removal by force. The learned Sessions Judge further appears to have been under the impression that the accused aimed a deliberate blow at the head of the faqir in consequence of an injury to his dignity. If it were necessary to adopt this view in the case, the sentence could only be described as extremely lenient, and it is even doubtful whether it would not have been possible to find him guilty of the full offence of murder. I can only say that if the accused in fact appeared to be a person who found it necessary to avenge an insult to his dignity by striking another person on the head with a hatchet with the intention of causing death, such a person could only be regarded guilty of nothing less than a culpable homicide, whom it would be desirable to keep under custody for as long a time as possible for the protection of the public in general.

I do not however find it necessary to take this view, which does not seem to be in accordance with the actual facts. I may say at once that while there is no reason to suppose that Mt. Bawi has not given a correct account of the way in which the fatal injury was inflicted, there is good reason to believe that she is not now telling the truth with regard to the earlier conduct of the constable. In her first statement, which she made al-

most immediately after the occurrence, she said nothing about the use of any physical force by the accused before the fatal blow was struck. If she had failed at that time to mention that she had been kicked by the constable, I should not have regarded this as necessarily constituting a discrepancy, since she might not have considered it necessary to mention it. The discrepancy goes deeper than that. In her statement before the Court, Mt. Bawi stated that she was woken up by being kicked by the accused. In her earlier statement, she stated that she woke up by hearing the voices of two men. These statements cannot be reconciled.

The statement that the accused shook the deceased by his hair is also not mentioned in the earlier statement, but there is a better reason for believing it not to be true. The deceased was an Indian Christian who was wearing a turban; and the learned Sessions Judge appears to have overlooked the fact that this turban was still covering the head of the deceased when the body was brought for post mortem examination. That the turban was still being worn by the deceased at the time of the occurrence is evident from the fact that there was a cut in it which corresponded with the injury on the head of the deceased. In view of this fact, it is difficult to see how the deceased could have been shaken by the hair as now alleged by the prosecution. It has to be remembered that young children, while they may be satisfactory witnesses up to a point, have a habit of exaggerating things in their own minds, and may not hesitate to give what appears to be quite a truthful account of the occurrence when they are actually adding details out of their imagination, as Mt. Bawi appears to have done in the present instance. Apart from these additional details, her statement which she made of her own accord in Court was shorter than the statement which she made in the first instance, and her memory as to details had to be refreshed by reference to what she had stated before, so that the occurrence could not have been quite so fresh in her mind as it was when she made the first statement. In these circumstances, if the conviction of the accused is to be based upon the evidence of Mt. Bawi, then I think it must be based only on that part of her evidence which can be reconciled with her earlier statement.

This elimination of the additional details must, I think, necessitate a modification of the view taken by the learned Sessions Judge as to the conduct of the accused throughout

the whole incident. It would appear that the constable, in pursuance of what he supposed to be his duty, went out late at night to the station premises with a view to taking precautions against the commission of crimes which were prevalent in the locality. In the course of his inspection, he found some beggars sleeping on the ground, and thought that it would probably be in the public interest if they went somewhere else. Having woken them up, not apparently by the use of any sort of force, he found himself engaged in argument with the man of the party, who was inclined to be truculent. While this was going on, without any warning, he suddenly found himself struck on the forehead by a blow with an extremely heavy implement. It appears from one of the earlier statements that what has been described in Court as a thick stick is in fact a heavy pestle used for the pounding of spices. Such implements are intentionally made heavy, and in the present instance it is stated that the implement actually weighed more than the hatchet which the accused was himself holding. Any blow on the head with a heavy implement is liable to cause a momentary disturbance of the faculties, if not actual concussion, and this is even more true when the blow is struck in the neighbourhood of the eyebrow where the results of such a blow are even more confusing. The blow here cut the skin of the eyebrow, from which blood was streaming, and there was still a scar in the same place when the accused appeared in the Sessions Court more than three months later.

I have come across many cases in which blows of this kind have left the injured person quite unable to realise what he is doing until some time later, and the learned Sessions Judge is probably making a mistake if he supposes that a person so injured has enough time to indulge in conscious thought about taking any deliberate action for the purpose of punishing any injury to his dignity. The first normal reaction of a person so injured would be to make any possible movement which might have the effect of warding off any further blow, but without any fully conscious realisation of what he was doing. If the victim was carrying anything in his hand, the first reaction would be to raise it in the direction from which a blow had been directed. The medical evidence in the present case is entirely in accordance with an almost automatic reaction of this kind. The injury on the head of the faqir ran in a slanting line for a few

inches from one eye to the middle of the forehead, and must have been apparently caused by the entry of one corner of the hatchet into the forehead. Such a slanting injury from the front is quite in accordance with a defensive raising of one hand and an outward movement for the same purpose, and this is different from a blow with the full length of blade on the top of the head, which would have indicated some conscious deliberation. There is nothing on the record to show how much light there was at the time; but the spot has been described as a waste space, which would probably have little light, and in any case the injury to the eye of the accused might make it quite impossible for him to see what he was doing.

A point of considerable importance to be taken into consideration at this stage of the occurrence is the time which must have elapsed between the two blows. In her earlier statement, the small girl mentions both blows in the same sentence as if one had occurred immediately after the other. This would not leave enough time for deliberation, and I think it is reasonable to assume in favour of the accused that the blow with the hatchet was given while he was reeling under the effect of the blow given with the pestle, as a purely defensive measure, and probably without any conscious intention beyond that. Since a blow on the head with a heavy instrument like the pestle in question might easily cause grievous injury, more particularly when it is in the neighbourhood of the temple, and since the first blow was given by the deceased when the constable had yet done nothing to justify such an assault, I think that a good case for the exercise of the right of private defence could be made out in favour of the accused, even if he had acted with any conscious intention of inflicting an injury which was likely to result in death; but, as I do not think it can be held as proved beyond doubt that the constable was fully conscious of what he was doing, in view of the probable consequences of the injury above his eye, the case for the defence stands on even a stronger footing and it seems to be rather a case of an act which could hardly be called voluntary in any sense that would make it criminal. For these reasons, I accept the appeal and acquit the accused.

G.N./R.K.

Accused acquitted.

A. I. R. (29) 1942 Lahore 36

BHIDE J.

Gurbaksh Rai — Petitioner

v.

Emperor.

Criminal Revn. No. 882 of 1941, Decided on 9th July 1941, reported by Sess. Judge, Amritsar, D/- 29th April 1941.

Public Gambling Act (1867), S. 13.—Whether place is public depends on its character and actual use — Public place in S. 13 means place where public go no matter whether they have right to go there or not — Bank of tank belonging to temple held public place.

The question whether any place is a public place within the meaning of S. 13 depends upon the character of the place itself and the use actually made of it. A public place is a place where the public go, no matter whether they have a right to go or not. [P 37f]

The bank of a tank belonging to a temple to which the public are allowed to have access and in which the people actually sit to bask in the sun is a public place within the meaning of S. 13 : ('26) 13 A.I.R. 1926 Lah. 149; ('17) 4 A.I.R. 1917 Mad. 124 and ('27) 14 A.I.R. 1927 Lah. 672, *Rel. on*; ('20) 7 A.I.R. 1920 Lah. 104; ('21) 8 A.I.R. 1921 Lah. 141 and 13 P.R. 1882 Cr., *Disting*; ('20) 7 A.I.R. 1920 Lah. 262, *Dissent*. [P 37g]

Narindar Nath Bhatia — for Petitioner.

Vir Sen Sawhney for Advocate General —
for the Crown.

REPORT. — The accused persons are said to have been gambling with cards on the bank of a tank known as Talab Devi Dawara, outside the abadi of Majitha village on 13th January 1941. The P. Ws. stated that the five accused persons were sitting on a dari on the bank of that Talab. The learned counsel for the petitioner has argued before me that this tank which was part of the property of Devi Dawara (a temple), could not be described as a public place within the meaning of S. 13 of Act 3 of 1867. Consequently, the accused could not be convicted under that section. Only one witness out of the P. Ws. namely Mohammad Ismail H. C. alleged that the Talab was on the Shara-e-am (thoroughfare). He, however, does not belong to this locality, being a police officer and admitted that the tank was outside the abadi of Majitha proper at a distance of about 1½ furlongs from the Thana and that the pond itself was a few yards away from the public road. The other P. Ws. also do not belong to the locality. The Talab was consistently described by them as property of the temple. In defence some persons of Majitha village were produced to show that the Talab was the property of the temple and was not a public place. In the site plan filed by the prosecution in this case, the

Talab is also described as Talab Devi Dawara. The learned Public Prosecutor on behalf of the Crown contended that as the accused included three Muslims, one Sikh and a Hindu, this indicated that the place was frequented by all communities and was a public place. But the evidence shows that only these five persons were there and no one else, at the time of the alleged occurrence. This does not indicate that this was a place of public resort. If the tank itself is the property of the temple and the accused were sitting on the bank of the tank, I do not think it could be plausibly argued that the gambling was going on in a public place. Gambling in a temple premises would not be an offence within the meaning of S. 13 as was laid down in 13 P.R. 1882 Cr.¹

In A.I.R. 1921 Lah. 141² it was held that the bank of a canal also could not be regarded as a public place for purposes of the Gambling Act as it was not dedicated to the use of the public and was not a thoroughfare. It was the property of the P. W. D. Moreover, merely because a place is visible from a thoroughfare, it would not become a public place. In that connection reference may be made to A.I.R. 1920 Lah. 104.³ In another authority reported in A.I.R. 1920 Lah. 262,⁴ some people were found gambling near a water tank within the Railway premises. It was held that they were not gambling in a public place, and it was remarked in the course of the judgment that even a Railway platform would not be a public place, because the right of entry to it was limited to persons holding platform tickets. In the present case too, I think the managers of the Devi Dawara would have the right to exclude any person they liked, from visiting the tank and merely because it was at a short distance from a public road would not convert it into a public place. I therefore recommend that the conviction and sentence of the petitioner be quashed and set aside, as they do not seem to be justified by law.

Order of the High Court

This is a petition for revision arising out of a case under the Public Gambling Act in which the petitioner Gurbaksh Rai was convicted under S. 13 and sentenced to a fine

1. ('82) 13 P.R. 1882 Cr., *Ghodu v. Empress*.

2. ('21) 8 A.I.R. 1921 Lah 141, *Matwala Ram v. Emperor*.

3. ('20) 7 A.I.R. 1920 Lah. 104; 56 I.C. 672; 21 Cr.L.J. 512; 104 P.L.R. 1920, *Moula v. Emperor*.

4. ('20) 7 A.I.R. 1920 Lah. 262; 57 I.C. 931; 21 Cr.L.J. 691, *Badrudin v. Emperor*.

a of Rs. 5. The case for the prosecution was that the petitioner along with certain other persons was found to be gambling on the bank of a tank attached to the Devi Dwara near the village Majitha. The main contention of the learned counsel for the petitioner is that the place in question was not a public place within the meaning of S. 13, Public Gambling Act. The learned counsel relied on 13 P.R. 1882 Cr.;¹ A.I.R. 1920 Lah. 104;³ A.I.R. 1920 Lah. 262⁴ and A.I.R. 1921 Lah. 141.² The learned counsel for the Crown, on the other hand, relied on A.I.R. 1917 Mad. 124,⁵ A.I.R. 1926 Lah. 149⁶ and A.I.R. 1927 Lah. 672⁷ and urged that the place where the b petitioner was gambling was a 'public place' within the meaning of S. 13, as the evidence on the record sufficiently shows that even if the public had no legal right of access to it, the public were as a matter of fact allowed access and that this was sufficient for the purpose of S. 13.

The learned Sessions Judge, before whom this petition for revision was presented at first, has recommended that the conviction of the petitioner should be set aside in view of the rulings cited for the petitioner. I am, however, of opinion that most of these rulings are distinguishable and that the conviction c of the petitioner was justified in the circumstances of the case. 13 P.R. 1882 Cr.¹ was a case in which the gambling had taken place in a Hindu temple. It was held by the learned Judges who decided the case that in view of the words "street" and "thoroughfare", between which the word "place" occurs in S. 13, the Hindu temple could not be considered to fall within the term "place". They apparently thought that the word "place" was used in the sense of open space like a street, thoroughfare, etc. A.I.R. 1920 Lah. 104³ is a brief ruling. The only question for decision in the case was whether the place where the gambling took place was a d part of a 'public street'. It was found as a matter of fact that it was not a part of the 'public street' and on this ground the conviction was quashed. The question whether the place where the gambling took place could fall within the meaning of the term "public place" was not considered. In A.I.R. 1920 Lah. 262⁴ it was apparently considered

that in order that a place should fall within the meaning of the expression "public place" a as used in S. 13, the public must have a right of access to the place. This view is, however, opposed to that taken in later rulings of this Court as will be shown presently. In A.I.R. 1921 Lah. 141² the question was whether the bank of a canal was a public place. It was found that the place was not dedicated to the use of the public and the Sessions Judge also found that there was no evidence to show that the public, as a matter of fact, were allowed to have any access to it.

It was pointed out by Sir Shadi Lal C. J. in A.I.R. 1926 Lah. 149,⁶ that the question f whether any place is a public place within the meaning of S. 13, Public Gambling Act, depends upon the character of the place itself and the use actually made of it. A public place is a place where the public go, no matter whether they have a right to go or not. The same interpretation was placed on the expression "public place" in A.I.R. 1927 Lah. 672⁷ in which the case law has been discussed at some length. A similar view was taken in A.I.R. 1917 Mad. 124.⁵ In the present instance the place where the petitioner was gambling is admittedly not enclosed. It is situated between the tank of the Devi Dwara and the public thorough- g fare and apparently the public are allowed to have access to it. Even Sundar Singh D.W. 1 has admitted that people do sit in this place for basking in the sun, etc. On the evidence as it stands on the record, it seems to me that the place where the petitioner was gambling would fall within the meaning of the expression "public place". The conviction of the petitioner was, in my opinion, justified in the circumstances. I, therefore, decline to interfere and direct that the records be returned to the learned Sessions Judge.

G.N./R.K. *Order accordingly.* h

* A. I. R. (29) 1942 Lahore 37

YOUNG C. J. AND BECKETT J.

Hasil s/o Qabul — Convict — Appellant

v.

Emperor.

Criminal Appeal No. 828 of 1941, Decided on 9th October 1941, from order of Sess. Judge, Dera Ghazi Khan, D/- 10th June 1941.

(a) Criminal trial — Duty of prosecution — Statement made by accused soon after occurrence should be brought on record.

Since it is the duty of the prosecution to bring out any evidence which may assist in arriving at a

5. ('17) 4 A.I.R. 1917 Mad. 124 : 36 I.C. 839 : 18 Cr.L.J. 7 : 40 Mad. 555 : 31 M.L.J. 285, In re Musa.

6. ('26) 13 A.I.R. 1926 Lah. 149 : 89 I.C. 975 : 26 Cr.L.J. 1455, Nura v. Emperor.

7. ('27) 14 A.I.R. 1927 Lah. 672 : 104 I.C. 230 : 28 Cr.L.J. 790 : 9 Lah. 255 : 28 P.L.R. 577, Muhammad Khan v. Emperor.

a true decision, a statement of the accused made almost immediately after the occurrence should be brought out at once in the trial Court as a relevant fact, even though it may contain something in favour of defence. [P 39e, f]

* (b) Evidence Act (1872), S. 25—Accused wanting to rely on his own confession—S. 25 is no prohibition.

The prohibition contained in S. 25 can be treated as applying only to confessions which are to be proved as against the accused, that is, in support of the prosecution case, and cannot apply to statements on which the accused himself wishes to rely in connection either with his conviction or his sentence. When two versions of the same incident are being put forward, it is often of the greatest importance for an accused to be able to show that his own explanation was put forward at the earliest possible opportunity and therefore an accused person should not be deprived of the right to make use of such a statement, merely because to a certain extent it goes against him. [P 39h; P 40a]

(c) Penal Code (1860), Ss. 300, 302 — Sudden and unpremeditated attack — Lesser penalty may be given.

The fact that the accused found the deceased in a compromising position with his wife is not sufficient to take the offence outside the category of murder where he had made a murderous attack on him on seeing it. It only shows that the affair was a sudden and unpremeditated one calling for sentence of transportation of life and not of death.

[P 40c, d]

Shabir Ahmad — for Appellant.

Bhagwan Das Mehra — for the Crown.

c **Beckett J.** — Hasil, Kaura and Allah Bakhsh have been found guilty of the murder of Ata Mohammad and have been sentenced to death. These are three out of seven persons who were originally charged for the murder and sent up for trial. They have appealed, and the sentences are before us for confirmation. The case is somewhat curious inasmuch as, according to either version, the trouble arose out of the fact that Hasil accused and Ata Mohammad deceased had exchanged their wives. At the time of the murder, Hasil was married to Mt. Aishan, while Ata Mohammad was married to Mt. Jannat. According to the prosecution version, the immediate cause of trouble was that Mt. Jannat had transferred land of her own to Hasil and an attempt was being made to get this land back by means of a pre-emption suit brought in the name of her small daughter, Mt. Bakhtawar, who was then only three or four years old. According to the prosecution story, Ata Mohammad was out collecting fodder along with his wife and daughter when he was set upon by Hasil and six of his relations, who did him to death. The defence version is that Hasil was coming back from paying a visit when he came upon Ata Mohammad in what

he considered compromising circumstances with Mt. Aishan, and was thereby provoked into killing him. Ata Mohammad died as a result of a large number of injuries, five being incised and seven being contused wounds. Both parties made reports at the nearest police station soon after the occurrence. Gul Mohammad, a brother of the deceased, arrived first and stated that he had come up along with a number of other persons in time to see the murder being committed. Hasil also arrived about half an hour later, having gone to look for a lambardar, who was not in the village at the time, but whom he had met on the way and whom he brought with him to the police station. At the same time, he produced a knife which was stained with human blood.

The learned Sessions Judge has held the evidence of the supposed eye-witnesses to be unreliable. He has given good reasons for considering it to be unlikely that any of them, with the possible exception of Mt. Jannat, could in fact have seen what they now claim to have seen, and although he has held that the presence of Mt. Jannat on the spot is supported by the presence of two bundles of grass and dry sticks, he has held that her account of what actually took place is not to be trusted. In convicting the three g appellants, he has treated certain injuries on the persons of Kaura and Allah Bakhsh as corroborating the statement of Mt. Jannat so far as these two are concerned, and he has treated the admitted presence of Hasil as corroborating the prosecution case against them. It does not appear to us that these can be considered altogether satisfactory reasons for accepting a modified version of the prosecution story, and each of them needs to be examined separately. Allah Bakhsh had one small abrasion on his left shoulder, measuring $1\frac{1}{2}'' \times 1\frac{1}{6}''$. Kaura had two small abrasions on his right leg and knee. It may be said at once that injuries of this type do not provide the slightest corroboration of the prosecution story. Any person may receive a slight abrasion of this kind in the course of his ordinary occupations. The learned Sessions Judge appears to have been impressed by the statement of the doctor to the effect that these injuries appeared to have been caused with some blunt weapons. Such a statement is often to be found in expert medical evidence and is used to distinguish such injuries from those which are caused with sharp-edged weapons. It does not exclude the possibility that the injuries may have been caused by an accidental contact with any hard sub-

stance, and I do not think that it can be taken as indicating that they are due to the use of a weapon in the ordinary sense. In any case, even if it should be taken that these injuries were due to the use of weapons, this could still not be taken as in any way supporting the statement of Mt. Jannat, who does not even suggest that any injuries were inflicted on the accused during the transaction. On the contrary, Ata Mohammed is said to have been carrying a bundle of grass on his head at the time when he was unexpectedly attacked. So far as Hasil is concerned, it is equally difficult to see how his statement that he alone met Ata Mohammad in company with Mt. Aishan can be taken as corroborating Mt. Jannat's statement that he attacked her husband in her presence after laying an ambush for him along with a number of other persons, if she is to be regarded as being otherwise an unreliable witness. Before there can be any question of convicting any of the appellants, it has first to be decided whether there is any sufficient evidence for holding that Ata Mohammad was deliberately murdered in consequence of the pre-emption proceedings and whether there is any sufficient reason for refusing to believe the story told by Hasil.

In favour of the prosecution story, it may be said that the pre-emption proceedings provide a slightly more probable cause of enmity than a meeting between Ata Mohammad and the woman with whom he had previously been married. The presence of the bundles of timber and grass may at first sight appear to support the presence of Mt. Jannat; but these might quite well have been brought by women who came upon the dead body while on their way home. On the other hand, there seems to be little doubt that the prosecution story has been bolstered up by false evidence. If none of the other prosecution witnesses was present when the murder was committed, we are left with the statement of Mt. Jannat. It has been found that she is not telling the truth on certain material particulars and this makes it impossible to be certain that she is telling the truth when she says that she saw the murder herself. It is true that a large number of injuries were inflicted on the deceased; but this may well happen when a man is attacked by a jealous husband and is in fact what frequently happens. The injuries are of two kinds, but this has been explained by Hasil. The number and nature of the injuries, therefore, do not provide any real corroboration of the prosecution story. On the view of the

evidence taken by the learned Sessions Judge, we do not think there is any material on which it could safely be held that Ata Mohammad was killed by a number of persons determined to murder him in the manner alleged by the prosecution. We are thus left with the admission of Hasil himself. In the first place, there is a confessional statement made by him to the lambardar before he was taken to the police station. The fact of this confession was not brought on the record by the prosecution, as we think it should have been presumably because it was considered that it might to some extent tell in favour of the defence, but was left to be elicited in the course of cross-examination. Since it is the duty of the prosecution to bring out any evidence which may assist in arriving at a true decision, and the statement of the accused Hasil was made almost immediately after the occurrence, it should have been brought out at once in the sessions trial as a relevant fact. It has now been brought on the record, however, and since reliance has been placed upon this statement by the defence, there is no reason to doubt that the confession was actually made. In this confession, Hasil stated that he had killed Ata Mohammad because he had seen Ata Mohammad and his wife sitting and talking together.

As already mentioned, Hasil then went to the police station where he made a statement and produced a blood-stained knife, soon after the first information report had been made by the other side. The defence wished to bring a copy of the statement made by Hasil to the police on the record during the Sessions trial. The learned Sessions Judge refused this request, on the ground that a confession made to a police officer was inadmissible in evidence, while remarking at the same time that the offence committed by Hasil would become less serious if the statement could be accepted. This ruling was based upon the provisions of S. 25, Evidence Act, which lay down that no such confession shall be proved as against a person accused of any offence. No reported decision which is exactly to the point has been brought to our notice. Most of the decisions which at first sight appear to be relevant are concerned rather with statements of an exculpatory nature, whereas we are here dealing with a statement which on the face of it would still make the accused liable to conviction for the serious offence. Even so, it appears to us from the plain wording of the section that the prohibition contained in s. 25 can be treated as applying only to con-

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SALE J.

*Bakhu and others — Convicts —**Appellants*

v.

Emperor.

Criminal Appeal No. 414 of 1941, Decided on 17th July 1941, from order of Sess. Judge, Gujranwala, D/- 27th February 1941.

Penal Code (1860), Ss. 326, 148 and 149 — Complainants' party consisting of five and that of accused consisting of six persons — At marriage party in house one of complainants' party refusing to allow accused's party to join in hugga — One of accused walking out and returning with his party armed with dangs and chavis — Complainants' party unarmed except for spade which one of them had picked up and ready and willing to fight not waiting to be attacked but going out to meet accused — Free fight ensuing — One of complainants receiving fatal injuries and dying while others seriously injured — Accused held guilty under S. 326 and S. 148 read with S. 149.

The complainants' party consisting of five and that of the accused consisting of six persons had assembled at a house to celebrate a wedding. One of the complainants' party refused to allow the accused's party to join in the hugga for certain actions of the accused. This was very irritating to the accused two of whom left and shortly afterwards returned with the other accused armed with chavis and dangs. The complainants who were unarmed except for a spade which one of them had picked up were obviously ready and willing to fight did not wait to be attacked but went out of the house to meet the accused. A free fight ensued in the course of which one of the complainants' party received fatal injuries to which he succumbed and the other four were also injured :

Held that the accused were guilty under S. 326 and S. 148 read with S. 149. [P 42f]

Asadullah Khan — for Appellants.

Sardar Kartar Singh for Advocate General — for the Crown.

Judgment. — At about noon on 29th August 1940, a fight occurred between two parties of Musallis at Uddoke. As a result of this fight, one person Ahmad received fatal injuries and died of fractured skull; while a number of other persons were injured. Six persons, Bakhu, Malla, Raju, Taju, Mathela and Dittu, were committed for trial to the Sessions Court of Gujranwala under ss. 302, 326, 148 and 149, Penal Code, for being members of an unlawful assembly, in the prosecution of the common object of which Ahmad was murdered. The learned Sessions Judge convicted all the accused under ss. 326 and 148 read with s. 149, Penal Code; and sentenced Taju as the youngest accused, to a total sentence of seven years' rigorous imprisonment and the remaining five accused each to a total sentence of ten years' rigorous

confessions which are to be proved as against the accused, that is, in support of the prosecution case, and cannot apply to statements on which the accused himself wishes to rely in connexion either with his conviction or his sentence. In cases of this kind, when two versions of the same incident are being put forward, it is often of the greatest importance for an accused to be able to show that his own explanation was put forward at the earliest possible opportunity, and we do not think that it can ever have been the intention of the Legislature that an accused person should be deprived of the right to make use of such a statement, merely because to a certain extent it goes against him.

We accordingly allowed counsel for the defence to go through the statement made by Hasil to the police; but as it does not add anything material to the statement previously made to the lambardar, which has been proved by oral evidence, it is unnecessary to refer to it any further. For the reasons already given, we are of opinion that the rest of the oral evidence in this case must be treated as unreliable and any conviction in connexion with the transaction by which Ata Mohammad met his death can be based only on the statement said to have been made by Hasil, combined with his conduct immediately after the occurrence. On this view, it cannot be held to have been satisfactorily proved that either Kaura or Allah Bakhsh had anything to do with the affair. Their appeals are accepted and they are hereby acquitted. So far as Hasil is concerned, it does not appear to us that the explanation given by Hasil of his own action is sufficient to take the offence outside the category of murder. It has been suggested that he may have been unwilling to disclose all the circumstances which led him to attack Ata Mohammad; but the statement made by him does not suggest that anything occurred which would justify Hasil in making a murderous attack upon Ata Mohammad. For these reasons, we affirm the conviction of Hasil under s. 302, Penal Code; but since, on the view taken above, the affair was a sudden and unpremeditated, we set aside the sentence of death and sentence Hasil to transportation for life. To this extent only the appeal is accepted.

R.S./R.K. *Appeal partly accepted.*

a imprisonment. From these convictions and sentences all the six accused have appealed.

Some four or five months before this occurrence, Mt. Ziadan, daughter of Dittu accused and wife of Bahawali (one of the complainants' party) was turned out of his house by Bahawali on account of her bad character. She was later brought back to the village by the accused's party. On the day of the occurrence, Sardara was to be married to Mt. Fatti the sister of Mathela accused; and Ahmad and his relations, who constitute the complainant's party, assembled at Sardara's house to celebrate the wedding. A dispute broke out between the two parties b because Yusuf one of the complainants' party declined to allow the accused's party to smoke a hookah with them owing to their action in bringing back Mt. Ziadan to the village. This refusal led to the fight. Raju and Taju accused are said to have left, and shortly afterwards returned with the other four accused, all of them armed. Malla, Mathela and Raju are said to have had chavis and the other three dangs, a fight ensued. The prosecution party say that they themselves were unarmed except that one of them picked up a spade and used it to defend himself during the fight against the attack by the c accused. In this fight five persons on the side of the complainants were ranged against the six accused. There are divergent versions as to the exact location of the fight. The prosecution now seek to locate it in Sardara's haveli which they say the accused entered to attack the complainants. The learned Sessions Judge however has found that the fight took place on open ground outside the haveli. In the course of the fight Ahmad received serious head injuries, both contused and incised. It was the incised injury which is proved to have been the actual cause of death. In addition four other persons were injured on the complainants' side, while out d of the six accused, four of them received injuries, Malla and Mathela each having an incised wound. The other injuries were trivial. Ahmad deceased was taken to the dispensary about two kos away where he was seen by the doctor at 7 P.M. on 29th August 1940. The first information report, however, was not given by Sada until 31st August 1940 at 2 P.M., that is, more than 48 hours after the occurrence. In this first information report all the six accused are named as the aggressors and it is said that they attacked the complainants' party inside Sardara's haveli.

The learned Sessions Judge has accepted Sada's statement as to the cause of delay in

the making of the first information report, viz., that he went to the thana soon after the occurrence but that the police would not record his report, and that the police consistently delayed the recording of the report until a telegram was sent by the doctor on the 31st. In the first information report itself however the cause of delay as given is that the relations of the accused intervened and endeavoured to persuade the complainants not to make a report. There is evidence given by the doctor himself that he sent a telegram to the police about Ahmad's injury on the 31st though the telegram has not been produced and the doctor cannot now remember the contents. This certainly indicates f that for some reason the recording of the report was being delayed and that the cause of delay was brought to the doctor's notice. It is however impossible to go further because the doctor cannot now remember the cause of delay and there is the sworn statement of the Sub-Inspector that the delay was not the fault of the police. The only fact that does emerge is that whatever may have been the cause, there was a more than 48 hours' delay during which time the complainants had plenty of opportunity to exaggerate the facts, as has been found by the learned Sessions Judge to be the case. g

When the Sub-Inspector came to the spot he satisfied himself by an inspection of the spot and through the finding of bloodstains that the location of the fight was not in Sardara's haveli but on the open ground outside. This fact supports the conclusion of the learned Sessions Judge that the fight took place in the open ground outside the haveli. The basis of the learned Sessions Judge's finding on this point is that the prosecution witnesses other than Khanu have all contradicted the statements which they made to the police where they said that the fight took place on open ground, whereas in evidence they seek to support the prosecution story as given in the first information report that it took place in Sardara's courtyard. h

As regards Khanu, it would seem that being a Jat and having no connexion with either the accused or the complainants' party, he should be a disinterested and reliable witness. He is also mentioned as an eye-witness in the first information report. Unfortunately no reliance can be placed on his evidence because he has given directly contradictory versions before the committing Magistrate and the Sessions Court, as has been brought out in his cross-examination. One of these versions must be untrue: and in the circum-

stances it is impossible for the Court to place any reliance on Khanu's evidence. We are therefore left with the other prosecution witnesses who are admittedly all inter-related and therefore by no means disinterested. Having regard to the discovery by the Sub-Inspector of blood-stains on the open ground, it certainly would seem that the learned Sessions Judge was right in holding that the prosecution witnesses cannot now be relied on in stating that the fight took place as a result of an attack by the accused inside Sardara's haveli. It would appear, as found by the learned Sessions Judge, that the prosecution party themselves went out to meet the accused's party and that a free fight took place on the open ground outside.

There is no doubt that the six accused were present in the fight. The only real question that remains for determination is whether the accused can succeed in their plea that they acted in the exercise of the right of private defence. Having regard to the fact that all the prosecution witnesses are interested and as proved by their contradictions and exaggerations not altogether reliable, we have to rely on circumstantial evidence for deciding who were the aggressors and whether the plea of self-defence is sustainable. As already stated, this is a case of five persons on the complainants' side versus six on the accused's side. There is no doubt that the complainants' party came off very much second best. All five of them were injured and one, Ahmad, received very serious head injuries, both contused and incised, as a result of which he died of fracture of the skull. On the accused's side, only two had injuries of which any notice need be taken, Malla and Mathela. Each bore incised injuries but they are not serious. The explanation given by the prosecution is that in the course of the fight one of the prosecution witnesses picked up a spade and used it to defend himself against the onslaught of the accused. It would certainly appear that if, as we must assume, the complainants' party went out to meet the accused's party on open ground, they must have been very much at a disadvantage in the way of arms, otherwise they would have rendered a better account of themselves in the fight. I would therefore accept the facts as found by the learned Sessions Judge that the accused's party were armed with chavis and dangs and that the complainants' party, except for the spade, which was produced by the prosecution witnesses in the course of investigation, were probably unarmed. These

circumstances coupled with the fact that the refusal of Yusuf, one of the complainants' party, to allow the accused's party, to join them in a hugga would be irritating to the accused and would therefore provide them with a motive for starting the fight, satisfy me that the accused's party were the aggressors.

It is however not possible to avoid the conclusion in this case that the prosecution witnesses have not told the whole truth and are certainly guilty of exaggerating the case against the accused. Moreover, they themselves were obviously ready and willing to fight and as found by the learned Sessions Judge did not wait to be attacked but went out to meet the accused. In these circumstances, I hold that while the accused have been rightly convicted under Ss. 326 and 148 read with S. 149, the sentences awarded by the learned Sessions Judge are excessive. I see no reason to distinguish between the case of Tajju who was given seven years' rigorous imprisonment and the other accused who were given ten years. I would reduce the sentences of all the accused to five years' rigorous imprisonment under S. 326 read with S. 149 and maintain the sentence of two years under S. 148. The sentences will run concurrently. The result would be that each of the accused will undergo rigorous imprisonment for five years. Otherwise, the appeal is dismissed.

G.N./R.K.

*Order accordingly.***A. I. R. (29) 1942 Lahore 42**

YOUNG C. J. AND SALE J.

*Mt. Ram Rakhi —**Defendant — Appellant
v.*

*Peoples Bank of Northern India, Ltd.
Gujrat (in Liquidation) through
Official Liquidator, Plaintiff and
another, Defendant — Respondents.*

Letters Patent Appeal No. 99 of 1940, Decided on 4th July 1941, from decree of Din Mohammad J. in S. A. No. 1821 of 1939, D/- 29th February 1940.

(a) Will—Construction — Precedents — Absolute estate—In construing whether will confers absolute estate precedents may be referred (Per *Din Mohammad J.*)

No doubt it is dangerous to construe the words of one will by construction of more or less similar words in a different will, which was adopted by a Court in another case, but the precedents cannot be ruled out of consideration altogether in order to determine whether, in the circumstances of a particular case, it could be safely held that an absolute estate was conferred upon the devisee: (22) 9 A.I.R. 1922 P. C. 68, *Ref.* [P 44c,e]

(b) Hindu law — Widow — Life estate — Widow enjoying life estate though treated as owner, still her estate is never more than that of widow's estate — Widow's estate — Nature of (*Per Din Mohammad J.*).

A Hindu widow, although enjoying a mere life estate, is treated as an owner so long as she remains in possession of the property, but, in spite of this, her estate is never more than that of a widow's estate limited in particular respects. Her right is of the nature of a right of property; her possession is that of owner; her powers in that character are, however, limited; but, so long as she is alive no one has any vested interest in the succession: ('16) 8 A. I. R. 1916 P. C. 117, *Rel. on.* [P 44g]

(c) Civil P. C. (1908), S. 100 — Intention is question of fact — But legal inference as to intention from document of title is question of law (*Per Din Mohammad J.*).

It is true that ordinarily the question of intention is a question of fact but when the question of the interpretation of a document of title is at the same time concerned, it is always a question of law to determine what legal inference can be deduced from the contents of the document taken as a whole. [P 45a,b]

(d) Hindu law—Will—Construction—Widow — Absolute estate held not conferred (*Per Division Bench.*).

The paramount intention of the testator must be determined from a reading of the will as a whole: ('29) 16 A. I. R. 1929 P. C. 283 and ('22) 9 A. I. R. 1922 P. C. 63, *Rel. on.*; ('30) 17 A.I.R. 1930 Lah. 695 and ('40) 27 A.I.R. 1940 P.C. 70, *Ref.* [P 46b]

The use of the word *malik* (owner) in a will must always be interpreted in relation to the context and in particular cases the circumstances or context may be sufficient to show that absolute estate was not intended: ('22) 9 A. I. R. 1922 P. C. 193, *Rel. on.* [P 46a,b]

A will made by a Hindu testator devised his property in the following words: "On my death my wife will be an owner and possessor like myself of the entire moveable and immovable property owned by me. During her lifetime my children will have no connexion with my property whatever, and she will be at liberty to manage it in any manner she likes. My wife, however, shall have no right to alienate my property without any legal necessity."

Held that the testator's intention was to confer a life estate on his wife since her power of alienation was expressly taken away by the testator and the will provided for the disposition of the property after his wife's death: ('22) 9 A. I. R. 1922 P. C. 63, *Rel. on.*; 80 All. 84 (P.C.); ('29) 16 A.I.R. 1929 P.C. 283 and ('33) 20 A.I.R. 1933 Lah. 365, *Disting.*; *Case law ref.* [P 46c,e]

(e) Appeal—Letters Patent—Point of law not taken before Single Judge (*Per Division Bench.*).

A contention based on a point of law which cannot be concluded by any admission which may have been made before the Single Judge can be raised in Letters Patent appeal. [P 46g]

(f) Hindu law—Alienation—Limited owner—Principles governing right of alienation for necessity do not apply to legatee whose title depends on terms of will (*Per Division Bench.*).

The principles of Hindu law governing the right of a limited owner to alienate for legal necessity do not apply to the case of a legatee whose title depends on the terms of a will. Consequently, the alienation by a widow which is directly contrary to the devolution of the property provided by the will of her husband under which she holds the estate is not merely voidable but void: ('21) 8 A. I. R. 1921 Bom. 413, *Ref.* [P 46h; P 47a]

Barkat Ali—for Appellant.

Bhagwat Dyal—for Respondent (Plaintiff).

S. A. No. 1821 of 1939

Din Mohammad J. — This appeal has arisen in the following circumstances. On 20th July 1910, Ladhia Ram bequeathed the whole of his property to his wife, Mt. Mathra Devi. The material portions of the will read as follows:

(1) So long as I am alive, I shall remain in possession of the property as an owner and on my death my wife, Mt. Mathra Devi, will be an owner and possessor like myself of the entire moveable and immovable property owned by me.

(2) During her lifetime my children will have no connexion with my property whatever, and she will be at liberty to manage it in any manner she likes.

(3) The shop will be managed as before by my wife, Mt. Mathra Devi. If any of my sons prove disobedient to my wife or turn out immoral, my wife like myself will be authorised to disinherit them.

(4) During her lifetime none of my sons will be entitled to interfere with the management of my property.

(5) My wife, however, shall have no right to alienate my property without any legal necessity.

(6) Chuni Lal and Mt. Durga Devi are not married and my wife will perform their marriages out of the property held by her. If she predeceases them, Rs. 1000 will be kept apart for the marriage of each of them and will be a charge on my property. The rest of the property will be equally divided among my three sons.

(7) If both (Chuni Lal and Mt. Durga Devi) are married during the lifetime of my wife, the whole of my property will be divided equally among my three sons.

Musammatt Mathra Devi remained in possession of the property under the will. On 16th August 1935, she bequeathed the shop in dispute along with some other property to Mt. Ram Rakhi, the wife of her son, Mela Ram. In 1937, Mt. Mathra Devi died and, on 27th January 1938, the present suit was instituted for a declaration that the shop in question was attachable in the execution of the plaintiff's decree against Mela Ram. Both the Courts below came to the conclusion that inasmuch as by the will of 1910 absolute estate had been conferred upon Mt. Mathra Devi, her will in favour of Mt. Ram Rakhi was legally valid and consequently, Mela Ram had no right, title or interest in the shop in suit. Hence this appeal.

Counsel for the appellant contends that the language of the will did not confer abso-

lute estate on Mt. Mathra Devi and argues that the use of the word 'malik' does not help her in any manner, inasmuch as her power of alienation was expressly taken away by the testator. In support of his contention, he relies on certain authorities which no doubt support him. In 6 I. C. 141,¹ a Division Bench of the Calcutta High Court in a case similar to the one before me remarked that when power of alienation was restricted the use of the words "owner and possessor like the testator" did not confer absolute estate on the devisee. In 90 I. C. 757,² where a devisee was made "malik mukammal" but it was provided at the same time that she would not be authorised to alienate the property except in case of necessity, it was remarked that only a limited estate was conferred upon the devisee. In 71 I. C. 748,³ the use of the word 'malik' alone was not considered enough and it was held that the surrounding context should always be considered to find out whether the estate was in any way limited or not. In 120 I. C. 387,⁴ the devisee was made a "malik mustaqil" but no powers of transfer to strangers were conferred upon her and it was further provided that the ownership would devolve upon her legal heirs generation after generation. It was held that in these circumstances it was only a limited estate that was conferred upon the devisee. In A. I. R. 1922 P. C. 193,⁵ it was remarked by their Lordships of the Privy Council that the term 'malik' did not necessarily connote an absolute owner. In 41 Bom 70,⁶ ownership was restricted by the condition that alienation was not authorised. It is true, as remarked by their Lordships of the Privy Council in 1 Pat. 305⁷ at p. 311, that it is always dangerous to construe the words of one will by the construction of more or less similar words in a different will, which was adopted by a Court in another case,

but the authorities referred to above cannot be ruled out of consideration altogether in order to determine whether, in the circumstances of the present case, it could be safely held that an absolute estate was conferred upon the devisee. In the Privy Council case referred to above their Lordships further remarked at p. 315 as follows :

The term malik, when used, in a will or other document, as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred. But the meaning of every word in an Indian will must always depend upon the setting in which it is placed, the subject to which it is related and the locality of the testator from which it may receive its true shade of meaning.

Applying the principle enunciated above to the will now before me, I do not feel any hesitation in holding that the testator in spite of giving plenary powers to Mt. Mathra Devi to manage the estate in any manner she liked did not intend to invest her with full rights of ownership, and it was for this reason that he expressly laid it down in the will that, except for legal necessity, she will have no right to alienate the property. It is well-known that a Hindu widow, although enjoying a mere life estate, is treated as an owner so long as she remains in possession of the property, but, in spite of this, her estate is never more than that of a widow's estate limited in particular respects. The nature of the widow's estate has been described by their Lordships of the Privy Council in a case reported in 39 Mad 634⁸ at p. 637 in the following terms :

Her right is of the nature of a right of property; her possession is that of owner; her powers in that character are, however, limited; but to use the familiar language of Mayne's Hindu Law, para. 625, page 870, so long as she is alive no one has any vested interest in the succession.

Counsel for the respondent, on the other hand, relies on 30 ALL. 84,⁹ 4 Luck. 483,¹⁰ and 14 Lah. 485,¹¹ but, in my view, these authorities are all distinguishable on their facts. In 30 ALL. 84,⁹ no restriction was placed on the power of the devisees to alienate the

- d 1. ('10) 6 I. C. 141 : 12 C.L.J. 391, *Kandarpa Nath Ghosh v. Jogendra Nath Bose*.
2. ('26) 13 A. I. R. 1926 Pat. 76 : 90 I. C. 757 : 7 P. L. T. 310, *Mt. Sheo Dani Kaur v. Ramji Upadhyaya*.
3. ('23) 10 A.I.R. 1923 Lah. 804 : 71 I. C. 748, *Ram Kishen v. Mt. Bhagerthi*.
4. ('29) 16 A. I. R. 1929 Oudh 193 : 120 I. C. 387 : 4 Luck. 452 : 6 O. W. N. 169, *Hanuman Sahu v. Mt. Abbas Bandibibi*.
5. ('22) 9 A.I.R. 1922 P. C. 193 : 65 I. C. 974 : 49 I. A. 1 : 46 Bom 153 (P. C.), *Bhaidas Shivdas v. Bai Ghulab*.
6. ('16) 3 A. I. R. 1916 Bom. 101 : 38 I. C. 9 : 41 Bom. 70 : 18 Bom. L. R. 943, *Rose D'Souza v. Joseph Joaquim Serpes*.
7. ('23) 9 A. I. R. 1922 P. C. 63 : 66 I. C. 193 : 49 I. A. 25 : 1 Pat 305 (P. C.), *Mt. Sasiman Choudhury v. Shih Narayan Choudhury*.

8. ('16) 3 A.I.R. 1916 P. C. 117 : 37 I. C. 161 : 43 I. A. 207 : 39 Mad 634 (P. C.), *Janaki Ammal v. Narayanasami Aiyar*.
9. ('08) 30 All. 84 : 5 A.L.J. 67 : 35 I. A. 17 (P.C.), *Surajmani v. Rabi Nath Ojha*.
10. ('29) 16 A.I.R. 1929 P. C. 283 : 120 I. C. 641 : 56 I. A. 372 : 4 Luck 483 (P. C.), *Raghunath Prasad Singh v. Deputy Commissioner Partabgarh*.
11. ('33) 20 A.I.R. 1933 Lah. 365 : 144 I. C. 651 : 14 Lah 485 : 34 P. L. R. 73, *Partap Chand v. Mt. Makhani*.

a police reached the spot soon after the report was made and they arrested the appellant who was wearing blood-stained clothes and who produced in the course of the investigation a hatchet stained with human blood. The case was sent up to the Court of the Committing Magistrate within a few days and Mt. Hussain Bi gave evidence as an eye-witness and Mohammad Wali, the father of the deceased, supported the first information report which he had made. When the case was tried by the learned Sessions Judge, however, both the sister of the deceased, Mt. Hussain Bi, and her father Mohammad Wali went back on their statements before the Committing Magistrate and these were duly transferred under S. 288, Criminal P. C. It must be remembered that the appellant himself is closely related to his deceased wife's relations. The appellant being thus a member of the family, his act in killing an unobscured wife does not appear to have alienated the father of this wife. This appears to me to be a reasonable explanation for the sister and the father of the deceased changing their statements. Before the Sessions Judge, Mt. Hussain Bi stated that she and her father were beaten by the police and were forced to make statements against the appellant. There is nothing on the record to support or substantiate this assertion and as remarked by the learned Sessions Judge it is unlikely that the Committing Magistrate who examined these witnesses soon after the occurrence would have failed to notice injuries if any had been inflicted by the police on these witnesses. Mohammad Wali himself does not say that he was beaten. His statement is that he was merely threatened and to this extent he contradicts his daughter. Mohammad Wali has stated before the Sessions Judge that he did not learn at the spot whether his daughter Mt. Hussain Bi had witnessed the murder with her own eyes. He says that he was forced by the Sub-Inspector that he should make a statement in terms of the report made by him. The story now put forward by this witness that the police recorded a false report appears to be utterly absurd. This story is falsified by the statement that after having recorded this false report the police insisted on securing the witness's thumb-impression after it had been read over to him. If a witness could be threatened into thumb marking a false report, I cannot see what necessity there was to read out this false report to him, because it was equally easy if not easier to get him to sign a report the contents of which he did not know. It is inconceivable therefore that the witness would have consented falsely to mention an innocent person as the murderer particularly when that person was his own son-in-law and was otherwise related to him.

Learned counsel for the appellant raised the legal objection that the statement made by a witness before the Committing Magistrate should have been specifically put to him before that statement could be used in evidence. He placed reliance on an old decision of the Allahabad High Court reported as 7 All. 862¹ in which a learned Judge observed that a Judge was bound to put to the witness whom he proposed to contradict by his statement made before a Committing Magistrate the whole or such portions of this deposition so as to afford the witness an opportunity of explaining the meaning of his deposition or denying that he had made any such statement. This decision appears to me to lay down incorrect law. Section 285, Criminal P. C., makes evidence transferred under that section substantive

1. (85) 7 All. 862, *Queen-Empress v. Dan Sahai*.

evidence for all purposes. The discretion is given to the Sessions Judge to transfer the statement made before a Committing Magistrate to his own record. Once he has done so, the evidence before the Committing Magistrate is as good as that recorded by himself and is useable for all purposes. Stress was laid on the words appearing in this section "be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act." The words "subject to the provisions of the Evidence Act" were explained by their Lordships of the Privy Council in A. I. R. 1937 P. C. 119.² It was observed there that the words "subject to the provisions of the Evidence Act" appearing in S. 288, Criminal P. C., cannot be read so as to limit the purpose for which the deposition may be used. Their Lordships went on to say that it could not be maintained that the deposition, when admitted under S. 288, could only be used for the purpose of cross-examination within the provisions of S. 155, Evidence Act, in view of the express provision of S. 288 of the Code, that is, that it is to be treated as evidence in the case for all purposes. There are observations in a case reported in A.I.R. 1930 Pat. 338³ to the effect that S. 145, Evidence Act, governs the position and that depositions taken before a Committing Magistrate, which contradict the evidence given in the Sessions Court, cannot be put in without putting to the witness portions of the statement with which it is sought to contradict the witness. These observations appear to me to be in direct conflict with the decision of their Lordships of the Privy Council cited above and must therefore be deemed to lay down an erroneous principle of law. It is true that their Lordships of the Privy Council were referring to S. 155, Evidence Act, but as I read the two provisions, S. 145 appears to me to be included in S. 155, Evidence Act. Section 145, Evidence Act, enables a witness to be cross-examined and contradicted with reference to previous statements made by him. This is one method of impeaching the credit of a witness. Section 155 deals generally with the impeaching of the credit of a witness and enumerates different methods of contradicting a witness. One of the methods mentioned in S. 155 of impeaching the credit of a witness is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted and in this sense the whole of the ground covered by S. 145 is included in S. 155, Evidence Act. In view of the clear decision of their Lordships of the Privy Council it is hardly necessary to discuss the matter further, except that reference may be made to a decision by a Division Bench reported in 28 All. 683,⁴ where Aikman J. expressed his strong disapproval of the decision of Straight J., in 7 All. 862¹ in the following terms :

"I am glad to have had an opportunity of expressing my dissent from the dictum in 7 All. 862,¹ referred to, as to the correctness of which I have for many years entertained the strongest doubt."

It has been laid down in 3 Lah. 144,⁵ that a Sessions Judge has an absolute discretion to allow the

2. (37) 24 A. I. R. 1937 P. C. 119; 187 I. C. 790; 38 Cr. L. J. 498; 64 I. A. 148; I.L.R. (1937) Bom. 711 (P.C.), *Fakira v. Emperor*.

3. (30) 17 A. I. R. 1930 Pat. 338; 129 I. C. 666; 32 Cr. L. J. 438; 12 P. L. T. 239, *Nanhu Mahtori v. Emperor*.

4. (06) 28 All. 683; 4 Cr. L. J. 61; 1906 A.W.N. 187; 3 A. L. J. 852, *Emperor v. Dwarika Kumari*.

5. (22) 9 A. I. R. 1932 Lah. 1; 68 I. C. 113; 23 Cr. L. J. 513; 9 Lah. 144, *Narain Das v. Emperor*.

a statement of a witness to be transferred. Once a statement has been transferred, then, as I have stated already, the statement is evidence for all purposes without limitation. The use and value of such statements was considered exhaustively by Plowden J., in 51 P. R. Cr. 1887.⁶ When there are two statements of a witness on the record which are contradictory of each other, it is a matter for the Judge deciding the case to make up his mind which of these statements he will act upon because either is substantive evidence. As pointed out by Sir Meredith Plowden :

"For the credit to be given to the statements, made or proved in accordance with law at a trial, of a particular witness, or of several witnesses, is a matter not regulated by rules of evidence or of procedure, but by the working of the reasoning faculty of each individual person who brings his mind to bear upon these statements for the purpose of determining whether he does or does not believe the facts stated with sufficient certainty to regard them as proved. The exercise of individual judgment in a particular case upon the evidence given in that case is not governed by rules of evidence or procedure, but is guided by experience, by observation of the demeanour of witnesses, by the observations of the Judge in his summing up and by other considerations, not regulated by Acts of the Legislature."

It appears to me to be certain in this case that Mt. Hussain Bi, who was at a short distance from her sister when that sister was attacked, must have heard the cries of her sister and therefore must have been able to identify the assailant. The time was broad daylight, the distance was small and the assailant was previously known to her. She would certainly not have implicated Sarwar appellant if she had not actually seen him committing the assault. She would not have mentioned Sarwar as the assailant to her father if in fact her statement was not true and her father would not have implicated his son-in-law in the first information report if Hussain Bi had not given him the information as an eye-witness. It appears to me, therefore, that the statement of Mt. Hussain Bi before the Committing Magistrate is true and is in itself sufficient for founding a conviction on.

Apart from the statement of Mt. Hussain Bi, however, we have the statement of Hukam Dad who says that he saw the appellant running away with a hatchet in his hand. The only objection to the statement of Hukam Dad is that he was not mentioned in the first information report. But Hukam Dad may well not have been seen by Mt. Hussain Bi and therefore the fact that he saw the appellant running away was probably not known to Mohammad Wali when he went to make the first information report. Beyond this, there is the production by the appellant of a blood-stained hatchet and the fact that he was wearing blood-stained clothes when arrested. It appears to me, therefore, that an offence of murder is proved beyond all reasonable doubt against the appellant and he has therefore been rightly convicted and sentenced. I would accordingly reject his appeal.

BLACKER J. — I agree.

G.N./R.K.

Appeal rejected.

6. ('87) 51 P. R. Cr. 1887, Umar v. Empress.

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FULL BENCH

TEK CHAND, DALIP SINGH, BHIDE,
ABDUL RASHID AND MUHAMMAD
MUNIR JJ.

*Baru and others — Defendants —
Appellants*

v.

*Niadar and others, Plaintiffs and
another, Defendant — Respondents.*

Letters Patent Appeal No. 21 of 1940, Decided on 20th May 1942, referred by Dalip Singh and Sale JJ., D/- 6th February 1942.

(a) Practice—New plea—Full Bench—Bench in Letters Patent appeal referring case to Full Bench—Plea that suit in civil Court was barred by res judicata by virtue of decision of revenue Court held did not involve question of jurisdiction and should not be allowed to be raised for first time before Full Bench (Per Full Bench).

The Bench in Letters Patent Appeal referred the case to the Full Bench. The plea that the suit in the civil Court was barred by res judicata by virtue of the decision of the revenue Court was not raised before the Letters Patent Bench nor before the single Bench nor was it raised in the trial Court or the lower appellate Court :

Held that the point was not a question of jurisdiction and should not be allowed to be raised before the Full Bench. [P 219 C 1]

C. P. C. —

(40) Chitaley, Ss. 100 & 101, N. 61, Pt. 4.

(41) Mulla, Page 374, Note "Plea which may be taken for the first time in special appeal."

(b) Punjab Tenancy Act (16 of 1887), S. 4 (5) — Word "holds" in S. 4 (5) — Meaning of (Per Full Bench).

The word "holds" in S. 4 (5) does not include a mere "right to hold" but means "actually or constructively" holds: 44 P.R. 1891 (F.B.) and 45 P.R. 1891 (F.B.), *Approved*. [P 220 C 2; P 222 C 1]

(c) Punjab Tenancy Act (16 of 1887), S. 77 (3) Words "dispute or matter"—Scope (Per Dalip Singh J.).

The words "dispute or matter" in S. 77 (3) must be read as qualified by the words "with respect to which any such suit might be instituted." h

[P 222 C 1]

(d) Punjab Tenancy Act (16 of 1887), S. 77 (3) — Word "such" appears in S. 77 (3) in original Gazette but is omitted in Punjab Record — Gazette must have precedence since it deals with Act of Central Legislature and must be presumed to be correct under Evidence Act (Per Full Bench).

The word "such" appears in S. 77 (3) in the original Gazette of India dated 24th September 1887 but does not occur in the Punjab Record 1887 where the Acts are printed. The Gazette must have precedence over the Punjab Record since it deals with an Act of the Central Legislature and must be presumed to be correct under the Evidence Act.

[P 222 C 1]

(e) Punjab Tenancy Act (16 of 1887), S. 77 (3) (d) and S. 77 (3), proviso (1)—Scope and applicability of S. 77 (3) (d)—Suit by occupancy tenant

out of possession to recover possession from his landlord of land of which he claims to be occupancy tenant — Suit does not fall under S. 77 (3) (d) and is cognizable by civil Court — S. 77 (3), Proviso (1) does not apply—Civil Court can try question whether occupancy right has been extinguished by abandonment: ('22) 9 A.I.R. 1922 Lah. 33 ; ('26) 13 A. I. R. 1926 Lah. 128 and ('26) 13 A.I.R. 1926 Lah. 338, *Impliedly overruled* (Per Full Bench).

Section 77 (3) (d) contemplates suits either by a tenant, that is, a person, who claims to be a tenant and is a tenant, to establish a claim to a right of occupancy, or by a landlord, that is, a person, who claims, or is admitted to be, or is found to be the landlord, to prove that a person admitted to be a tenant has not a right of occupancy. Section 77 (3) (d) applies only when the relationship of landlord and tenant is admitted and the nature of the tenancy alone is in dispute : ('31) 18 A.I.R. 1931 Lah. 362, *Approved*. [P 221 C 2]

A suit by an occupancy tenant who is out of possession to recover possession from his landlord of the land to which he claims the occupancy rights does not fall within S. 77 (3) (d) because it is not a suit by a "tenant" to establish a claim to a right of occupancy and therefore is initially within the jurisdiction of the civil Court : 9 P.R. 1888 (F. B.); 44 P.R. 1891 (F.B.); 45 P. R. 1891 (F.B.) and ('27) 14 A. I. R. 1927 Lah. 452 (F.B.), *Approved* ; ('38) 25 A.I.R. 1938 P. C. 219, *Disting.* [P 219 C 1 ; P 223 C 1]

In such a suit the civil Court is not precluded by reason of S. 77 (3), Proviso (1) from trying the question raised by the defendant that the occupancy right has been extinguished by abandonment because the suit as filed by the tenant does not come within S. 77 (3) (d) and if it were brought by the defendant landlord against the plaintiff tenant on the plea of abandonment it would not be within S. 77 (3) (d) because the landlord would not be admitting the plaintiff tenant to be a tenant in the hypothetical suit : ('22) 9 A. I. R. 1922 Lah. 33 ; ('26) 13 A. I. R. 1926 Lah. 128 and ('26) 13 A. I. R. 1926 Lah. 338, *Impliedly overruled*. [P 219 C 1 ; P 223 C 1]

(f) Jurisdiction.—For determining question of jurisdiction nature of suit must be decided on basis of averments in plaint and not on basis of defence (Per *Bhida* and *Tek Chand JJ.*).

The nature of a suit for the purpose of determining jurisdiction has to be decided on the basis of the averments in the plaint and not on the basis of any defence that may be taken up. [P 223 C 2]

C. P. C. —

('40) Chitaley, S. 9, N. 7, Pt. 2.

(g) Punjab Tenancy Act (16 of 1887), S. 77 (3), Proviso (1) — Word "matter" in proviso—Meaning of—Object of proviso—Proviso must be read with S. 77 (3) (Per *Bhida J.*).

The word "matter" in S. 77 (3), Proviso (1) is more comprehensive than the word "dispute." A matter on which the parties are "at issue" may be described as a "dispute", but when the parties are not at issue, the matter could only be described as a "matter". The object of the proviso was that whether the parties are or are not at issue on a particular matter, if the matter is such that it can only be heard and determined by a revenue Court and if a finding has to be given thereon the Court should adopt the procedure laid down in the proviso. Even if a point is not disputed, a finding may still be necessary and may have to be given on the admis-

sion of a party. The proviso must obviously be read with S. 77 (3). [P 225 C 2]

(h) Punjab Tenancy Act (16 of 1887), S. 77 (3) — Words "no other Court such suit might be instituted" in S. 77 (3) — Scope (Per *Bhida J.*).

The words "no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted" in S. 77 (3) are comprehensive enough to include disputes or matters, whether they are raised in the averments in the plaint or arise out of the pleas of the defendants. If they are raised in the plaint, the suit would not be initially cognizable by a civil Court. But, if they arise out of the pleas of the defendants, the suit may be initially cognizable by a civil Court, but would cease to be so when the Court finds that there is a dispute or matter with respect to which a suit falling within one of the clauses of S. 77 (3) could be instituted. [P 225 C 2]

(i) Interpretation of statutes—Act restricting civil Court's jurisdiction ought to be construed strictly (Per Full Bench.).

An enactment which restricts the jurisdiction of civil Courts ought to be construed strictly.

[P 227 C 1]

C. P. C. —

('40) Chitaley, Preamble N. 7, Pt. 33.

(j) Punjab Tenancy Act (16 of 1887), S. 77 (3) (d)—Applicability (Per *Bhida J.*).

In order to see whether S. 77 (3) (d) applies to the circumstances of a case, it is necessary to see whether all its requirements are fulfilled. It is, therefore, necessary to consider not only the nature of the dispute, but also the status of the parties as mentioned therein. Unless it is shown in any particular case that there is a "matter" to be decided with respect to which one or the other party could institute a suit which would be cognizable by a revenue Court only, the jurisdiction of the civil Courts will not be ousted. [P 227 C 1, 2].

Qabul Chand Mital — for Appellants.

Lala Achhru Ram — for Respondents.

DALIP SINGH J. — The facts of this case are stated in the referring order, dated 6th February, 1942, and may be briefly recapitulated here for clearness. The present defendants, the landlords of the land in dispute, were sued in the revenue Courts by the present plaintiffs, who alleged themselves to be occupancy tenants, on the ground that the occupancy tenants, the plaintiffs, had put the defendants, the landlords, into possession of the land as tenants-at-will but they had refused to pay rent and therefore should be ejected. The present defendants, the landlords, took the plea that they never have been tenants and they had entered upon the land because the plaintiffs had abandoned their rights of occupancy which had become extinguished by reason of this abandonment. This plea was upheld by the revenue Court which decided that the plaintiffs' rights of occupancy, which otherwise had been established and would have existed, had been extinguished by abandonment. Thereafter the plaintiffs brought the present suit in a civil Court for possession of the land on the ground that they were its occupancy tenants and the landlords who were in possession were merely trespassers thereon. The trial Court held that the plaintiffs were the occupancy tenants originally, that it was not proved that they had ever abandoned their occupancy tenancy and that, therefore, the same had not been extinguished but it upheld the plea of the defendants that the civil Courts had no jurisdiction in the matter and returned the

a plaintiff for presentation to the revenue Court. On appeal, the learned Senior Sub-Judge upheld the findings of the trial Court on the merits but upset the decision as regards jurisdiction and, therefore, accepted the appeal and decreed the suit for possession. On appeal to this Court, the learned Judge in Single Bench held that the civil Courts had jurisdiction to try this suit. He gave no decision on the question whether the decision of the revenue Court was *res judicata* or not. He, therefore, dismissed the appeal. From that order the matter went to the Letters Patent Bench which refused, for reasons given in the referring order, to allow the defendant-appellants to raise the question of *res judicata*. On the question of jurisdiction, however, it referred two questions to a Full Bench which are formulated as follows :

b "(1) Is a suit by a dispossessed occupancy tenant to recover possession from his landlord of the land to which he claims the occupancy rights initially within the jurisdiction of the civil Court or not?"

(2) Even if the first question be answered in the affirmative, is the civil Court precluded from trying the question whether the occupancy right has been extinguished by abandonment by reason of proviso (1) to S. 77 (3), Punjab Tenancy Act?"

c The referring order pointed out that the first question involved a reconsideration of the Full Bench ruling reported in 9 Lah. 38¹ and, therefore, the Judges to constitute the present Full Bench should be at least five, if not more. The present Full Bench was constituted for the purpose of trying the two questions referred. Before proceeding to deal with the questions I may point out two things: The learned counsel for the appellants now wished to raise another point, namely, that such a suit was not competent after the decision of the revenue Courts on the subject. This point was never raised by him at any stage previously, neither before the Single Bench nor before the Letters Patent Bench, nor does it appear to have been raised in the trial Court or in the lower appellate Court. For this reason, the Full Bench decided that he should not be allowed to raise this point. I shall however have occasion to refer to the point really involved, though not in the form in which it was sought to be put by the learned counsel for the appellants. Secondly, I have to point out that the word "dispossessed" in the first question formulated was merely used in its general sense of "out of possession." There was no endeavour to make any distinction between dispossession which was unlawful and dispossession which was lawful or made in due course of law. The question was intended to cover both classes of cases, it being assumed merely that the plaintiffs seeking to recover possession were out of possession, whether actual or constructive. The reason for referring the second question was that the reasoning given in the Full Bench decision, 9 Lah. 38¹ proceeded on different lines in the various judgments in that case and it was not clear whether the reasoning of all the Judges was equally reconcilable and what the decision was on the second question. Speaking for myself, as I also was one of the Judges in 9 Lah. 38¹ I may say with all respect to the other Judges that my judgment clearly involved by its reasoning the decision that the civil Court was not precluded from trying the question of the existence of the occupancy rights by reason of proviso (1) to S. 77 (3). On the other hand, the reasoning of the other learned Judges seems to imply that the civil Court might be

precluded from trying this question though all that was held generally was that if a question arose which by reason of the proviso had to be decided by a revenue Court, then the whole case would have to be sent to the revenue Court. Having thus cleared the ground, I now pass on to consider the points actually referred and I shall consider the first question formulated first. The question was really considered for the first time, so far as I am aware, in a Full Bench decision reported in 9 P. R. 1888,² but the proviso to sub-a. (3) of S. 77 was inserted later and there have been other changes also in the Act. In that case it was held by the Full Bench :

"A suit in which the plaintiff asks to be placed in possession of land on the ground that he is entitled to hold such land as a tenant with a right of occupancy, is not one 'by a tenant to establish a claim to a right of occupancy' within the meaning of S. 45 (a) of Act 18 of 1884, and so cognizable by the revenue Courts only, but is a suit, the jurisdiction to hear which rests with the civil Courts."

The reasoning was that though it is essential to the obtaining of the relief asked for in such a case that plaintiff should establish his claim to a right of occupancy, this question of title is only raised incidentally, while the cause of action alleged by plaintiff is being wrongfully deprived of, or kept out of the cultivating possession of certain lands, and the relief he asks for is a restoration to such possession, a relief which only the civil Courts can give him. In those days the exclusive jurisdiction conferred on the revenue Courts was not embodied, as it is now, in S. 77, Punjab Tenancy Act of 1887, but words to the same effect as in the present Tenancy Act were used in S. 45, Punjab Courts Act (18 of 1884) of those days. Nevertheless, in the main the situation is not different under the present Act and it must be taken that if this decision is correct, then the same result would follow to-day. But it is contended that certain other changes have taken place, in particular the definition of the word "tenant" in the Punjab Tenancy Act, in S. 4 (5) and the addition in the present Act by which successors-in-interest or predecessors-in-interest of a tenant and landlord are included in the definition of "tenant" and "landlord." Now the definition of "tenant" in S. 4 (5) reads as follows :

"Tenant" means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that other person."

"Landlord" is defined in S. 4 (6) as follows :

"Landlord" means a person under whom a tenant holds land, and to whom the tenant is, or but for a special contract would be, liable to pay rent for that land."

"Tenancy" is defined in S. 4 (8) as follows :

"Tenancy" means a parcel of land held by a tenant of a landlord under one lease or one set of conditions." The next case where these definitions were authoritatively considered is 44 P. R. 1891,³ also a Full Bench case. The facts of that case were that possession of land was sought against the proprietors of the land by the alleged heirs of the deceased occupancy tenant and the question was whether such a suit was cognizable by a civil Court or by a revenue Court. A Full Bench held that such a suit did not fall either under cl. (d) or cl. (f) of S. 77, sub-a. (8), Punjab Tenancy Act, and the reasoning was that in order to establish the relation of landlord and tenant between two persons in respect of

1. ('27) 14 A.I.R. 1927 Lah. 452 : 105 I. C. 507 : 9 Lah. 38 : 29 P.L.R. 489 (F.B.), Cheta v. Baija.

2. ('88) 9 P.R. 1888 (F.B.), Nihal Singh v. Kaman.
3. ('91) 44 P. R. 1891 (F. B.), Joti v. Maya.

land it was essential that two things shall concur, namely, (1) a right to enter upon and possess the land and (2) an entry into possession. It was only upon entry and not before that the person having the right to be a tenant becomes a "tenant" and "holds" the land under the person called the landlord. It is true that in the course of the judgment certain observations are made that once the relationship was established, dispossession of the person would not necessarily end the relationship of landlord and tenant originally established between them; but this question and when and how the relationship would be determined was left open as it followed from the reasoning that the person in question never having entered into possession would not by any means be a tenant, whatever might be the meaning that should be attached to the word "holds" in the definition.

The next case is 45 P. R. 1891,⁴ also another Full Bench case, where the point which had been left open in the previous Full Bench decision arose directly. The Full Bench held that once it had been decided by the previous Full Bench that in order to establish the relationship of landlord and tenant between two persons in respect of land there must not only exist the right to enter upon and hold the land but also an actual entry into possession, it would follow logically that continuance of possession was essential for the maintenance of the relationship between the parties and that the dispossession of the tenant would ordinarily in the absence of any indication to the contrary in the Tenancy Act itself sever this relationship. Such an indication to the contrary they found in S. 50 and S. 77(3)(g) of the Act which refers to S. 50. They were of opinion, therefore, that a tenant who had been dispossessed would normally speaking cease to be a tenant under the Punjab Tenancy Act but that under S. 50 for a period of one year from the date of dispossession his suit for recovery of possession was cognizable only by a revenue Court. Subsequent to that period, namely of one year, his remedy, if any, must be sought in the civil and not in the revenue Court. They gave no opinion on the question as to whether the remedy still existed, but they stated that they concurred generally with the reasoning of Sir Meredyth Plowden in the referring order. In that reasoning the following words occur:

"I am inclined to think that it is only for the purposes of this suit that the dispossessed tenant is regarded by the Act as continuing to hold the land of his tenancy after dispossession. He does not in fact hold the land after he has been dispossessed, though he has the right to hold it."

There also occur the following sentences:

"To a rule, that a tenant on being dispossessed ceases to be a tenant, the Court must, following the Legislature make the exception made in S. 50. If we look at the converse case, namely when a tenant wrongfully relinquishes his land, without notice, we find that he is not described in the Act as a tenant after such relinquishment. He is liable under S. 36 (3) for rent, under prescribed conditions; and he is liable to be sued for arrears of rent in a revenue Court under S. 77 (3) (n), but the word tenant is excluded in that clause.

Ordinarily, then a tenant is a person who has a right to hold, and does hold, and the person described in S. 50 is a tenant only by an exceptional use of the term tenant, and only as it seems to me, during the period prescribed for bringing this special

suit granted to him by S. 50, and for the purpose of exercising this right to sue."

Now the reasoning of the Full Bench amounts to this: The words "holds land under" might have been held to mean either "actually holds" or both "actually holds or has the right to hold" but the Full Bench in 44 P. R. 1891³ has pointed out that even under the general law a tenant does not become a tenant until he has entered into possession and that, therefore, the word "holds" in section 4 (5), Tenancy Act, would not include a person merely with a right to hold for if it did so, then obviously an entry into possession was not necessary. The Full Bench in 45 P. R. 1891⁴ held that it followed logically from this definition that a person who was not actually holding a land was not a tenant within the meaning of S. 4 (5), Punjab Tenancy Act, but they pointed out that for the purposes of S. 50 and for the space of one year under that section from the date of dispossession the person, though not holding land, continued to be described in the Act as a tenant. In other places he was not so described. Put shortly then, the two Full Benches together came to the conclusion that the word "holds" does not mean or include merely the "right to hold" but means "actually holds." By "actually" I take it they meant not necessarily "actual physical possession" but both "actual" and "constructive possession." But if the tenant were ousted both from actual or constructive possession, then he ceased to be a tenant under the Act, except where there was a clear indication to the contrary as was found in S. 50. Whether S. 50 meant that the right to bring a suit by a person falling within its purview was limited to the revenue Courts and the limitation for a suit for possession was cut down from the normal twelve years to one year or whether it meant that for the period of one year the suit could be brought only in the revenue Courts but thereafter the suit could be brought in the civil Courts upto the period of twelve years was left open by the Full Bench in 45 P. R. 1891.⁴ This point was next considered in 64 P. R. 1898.⁵ There, a Division Bench held that S. 50, Punjab Tenancy Act, did not restrict the period of limitation allowed to a dispossessed occupancy tenant when suing for possession in the civil Courts and, therefore, that a plaintiff who had been ejected from his occupancy holding more than one year previous to the date of the suit but within the period of twelve years could do so and the suit was not barred by S. 50 of the said Act. This ruling followed the reasoning of Plowden J. in the referring order in 45 P. R. 1891.⁴ It accepted that reasoning and based its decision on it.

This ruling was considered and overruled in 90 P. R. 1918⁶ where Shah Din, Chevis and LeRossignol JJ. were the Judges. In that case the plaintiff sued the defendants the landlords, who had dispossessed him in 1915 for recovery of possession and obtained a decree on 8th May 1916. The dispossession had taken place in 1915. More than a year after his dispossession, he brought a suit for compensation for the period of dispossession. It is thus clear that in this case the person bringing the suit was a tenant at the time he brought the suit for he had recovered possession under a decree. It was held that the suit was cognizable only by a revenue Court and not by a civil Court, even though it was not brought within one year of the date of plaintiff's dispossession because of S. 50 and S. 77 (3) (g).

5. (198) 84 P. R. 1898; Imam Din v. Feroz Khan. 6. (1918) 90 P. R. 1918; 475 : 43 L. C. 8 : 90 P. R. 1918 (F.B.), Akbar Hussain v. Karam Dad.

3. (191) 44 P. R. 1891 (F.B.), Kesar Singh v. Nihal Singh.

^a Punjab Tenancy Act. The cases in 45 P. R. 1891⁴ and 64 P. R. 1895⁵ were held distinguishable from the present suit. In the main judgment of Chevis J. the learned Judge, however, went on to express an opinion that in S. 50 "we must regard the word 'tenant' as meaning a person who formerly held land under another, in other words, an ex-tenant." In his opinion, therefore, S. 50 had cut down limitation for a suit for possession to one year and that the powers of the civil Court to hear such a suit at all had been definitely excluded. In other words, the learned Judge was of opinion that the meaning of S. 50 was not as suggested by Plowden J. that for the purposes of S. 50 the ex-tenant should be regarded as a tenant for one year and could sue in the revenue Courts in that period, thereafter being compelled to resort to the civil Courts for the usual remedy for dispossession but that in cases under ^b S. 50 the jurisdiction of the civil Courts had been ousted permanently and the limitation for the suit had been cut down to one year. So far as Le-Rossignol J. was concerned he held that S. 77 (3) (g) and (i) appeared to cover all conceivable cases of litigation between a landlord and his tenant qua tenant. He, therefore, concluded that an ex-tenant in that capacity could look for no relief outside the revenue Courts and that the civil Courts could only hear his plaint if he claimed relief in a capacity other than that of an ex-tenant. Shah Din J. was of opinion that he had lost his remedy altogether if he failed to bring a suit within the one year prescribed by S. 50. In other words, though this was not always clearly stated in the various judgments except by Shah Din J. the civil Courts had no jurisdiction to hear a suit brought by an ex-tenant after the period of limitation prescribed by S. 50 for a suit in the revenue Courts.

^c This question is a totally different one to the one raised by counsel for the appellants before the Full Bench, namely, as to the competency of the suit because whether a suit is competent or not is a question which must be decided by somebody or other and can only be decided properly by a Court having jurisdiction to decide the point. Therefore, the question really is not one of competency of the suit but the question of the meaning of S. 50. I do not express any opinion on this point as no such point was ever raised before the Letters Patent Bench or at any time during the course of the trial of this suit. Had this question been raised before the Letters Patent Bench which referred these points to the Full Bench, I should also have referred this point to the Full Bench for a decision, for though in terms 45 P. R. 1891⁴ left the question open, yet, as pointed out that Full Bench accepted and based its reasons for decision on the reasoning of Plowden J. which expressly held that the meaning of S. 50 was different from the meaning given to it by the Full Bench in 90 P. R. 1918.⁶ Shah Din J. in this latter ruling was the only one who definitely stated that 64 P. R. 1895⁵ was wrongly decided and should be overruled though there were expressions of opinion by Chevis and Le-Rossignol JJ. to the same effect. Moreover, strictly speaking the opinions of the Full Bench in 90 P. R. 1918⁶ were obiter in the sense that as pointed out in the judgment of Chevis J. the facts of the case were distinguishable both from 45 P. R. 1891⁴ and 64 P. R. 1895⁵ in that the person dispossessed had recovered possession before he brought the suit and it might well be held that being a tenant when he brought the suit, his suit fell within S. 77 (g), Tenancy Act. Be that as it may, it seems to me that the reasoning of the next Full Bench reported in 9 Lah. 881

would appear not to have accepted the reasoning of 90 P. R. 1918⁶ at least in the judgment of the majority of the Judges. The judgment of Addison J. no doubt appears to rely on 90 P. R. 1918⁶ but I do not read the judgment of Broadway J. as relying on 90 P. R. 1918⁶ or even as considering that ruling as being correctly decided for it was definitely held by Broadway J. that the initial jurisdiction, at any rate, for such a suit lay in the civil Court, whereas, if I have rightly understood the decision in 90 P. R. 1918⁶, the civil Court would have no jurisdiction whatsoever whether initial or plenary. It is, however, unnecessary to go more deeply into this matter for, as I say, the point was not raised in this form by the learned counsel for the appellants and in the form that he did raise it, it was not a question of jurisdiction and was not allowed to be raised by the Full Bench.

^f I now pass on to consider the next ruling, namely, 9 Lah. 881. In that ruling the question submitted to the Full Bench was whether a civil Court has jurisdiction to try a suit brought by a person who has been dispossessed from his tenancy after a notice issued to him under S. 43, Tenancy Act, and who has been unsuccessful in a suit under S. 45 to contest his liability to ejectment, for possession of the land from which he has been ejected on the ground that he has a right of occupancy therein, and whether S. 77 (3) (d) of the Act bars such a suit or not. It was held that the civil Court has jurisdiction to try such a suit and it is not barred by S. 77 (3) (d), Punjab Tenancy Act. As an obiter it was also stated that the civil Court would have to deal with such a suit in accordance with the procedure prescribed by proviso (1) to S. 77 (3) (d) and its jurisdiction would continue unless and until it becomes necessary to decide a matter which can under this sub-section be heard and determined only by a revenue Court. I do not propose to plunge into the mass of rulings which followed this Full Bench. It is sufficient for me to state shortly that various Judges came to opposite conclusions and sometimes even the same Judge came to opposite conclusions in these rulings which profess to follow the Full Bench decisions. It is this conflict that has led to the present Full Bench in which the proviso and the meaning of S. 77 (3) have got to be considered. According to my own view, as given in 9 Lah. 881 the suit was not barred by S. 77 (3) (d) as held by the majority of the Full Bench nor could the proviso bar a suit from being tried by the civil Court. As I read S. 77, sub-s. (3) (d), which is the sub-section involved, the suits contemplated by that clause are suits either by a tenant, that is, a person, who claims to be a tenant and is a tenant, to establish a claim to a right of occupancy, or by a landlord, that is, a person, who claims, or is admitted to be, or is found to be the landlord, to prove that a person admitted to be a tenant has not a right of occupancy. In the present case the suit is by the persons who allege that they have a right of occupancy but they do not allege themselves to be tenants within the meaning of S. 4 (5), Tenancy Act, because their cause of action is that they no longer hold the land which they are entitled to hold. Hence their suit is clearly not within S. 77 (3) (d) because it is not a suit by a "tenant", to establish a claim to a right of occupancy.

^h The decision of this point, therefore, clearly turns on the meaning to be assigned to the word "holds" in S. 4 (5), Tenancy Act. Now the way I look at the matter is this: I consider that 44 P. R. 1891³ was rightly decided because even under the general law a person does not become a tenant unless he

a has entered into possession. I am unable to see anything in the Act or in the scheme of the Act whereby a person who has never entered into possession could be held to be a tenant by reason of the definition. This could only happen if "holds" was construed to mean or to include "the right to hold." The result would be curious. If a landlord executed a lease in favour of a tenant and thereafter refused to let him into possession, then if "holds" includes the right to hold, the person claiming under the lease would be a tenant and a suit brought by him to recover damages for breach of contract or for specific performance of the contract would be in the revenue Courts. I cannot see anything to justify so startling a change in the whole system of law, nor do I know of any case where it has been held that such a suit would lie only in the revenue Courts. Even if it was a question of doubt whether the word "holds" should be construed as "actually holds" or including "the right to hold," then I would say that since it is a general principle of law that the Act restricting the powers of Courts of ordinary jurisdiction must be strictly construed, it would follow that the narrower interpretation must be preferred to the wider interpretation. For both these reasons, I am clearly of opinion that 44 P.R. 1891³ was rightly decided and if this was rightly decided, it follows that 45 P.R. 1891⁴ was also rightly decided because as rightly pointed out by the learned Judges in that case, if "holds" does not include "the right to hold," it follows that a person who does not actually hold the land is not a tenant within the meaning of S. 4 (5). If this is so, then it follows that the present suit is not within the purview of S. 77 (3) (d) and I need say no more upon this point. So far as S. 77 (3) is concerned, the question is what meaning is to be given to the words "dispute or matter" in that sub-section. The sub-section reads as follows : "The following suits shall be instituted in and heard and determined by Revenue Courts, and no other Courts shall take cognizance of any dispute or matter with respect to which any such suit might be instituted."

I pause a moment here for a slight digression rendered necessary by the fact that in some copies the word "such" is omitted. I have looked up the original Gazette and in the Gazette the word "such" does occur. However in the Punjab Record, where the Acts are printed, the word "such" has been omitted. Some copies, therefore, have preferred the Punjab Record and some copies have followed the Gazette but I take it that the Gazette must have precedence since that deals with an Act of the Central Legislature and must be presumed to be correct under the Evidence Act and I, therefore, consider that the section must be read as if the word "such" existed. This makes the matter perfectly clear though even if the word "such" did not exist, I do not think it would make any difference to the result. The words "dispute or matter" must be read as qualified by the words "with respect to which any such suit might be instituted." But it is obvious that with respect to the dispute or matter between the parties now no such suit could be instituted by either party within the meaning of S. 77 (3) (d). If the suit was brought, as it has been by the tenant, I have already given reasons for holding that the suit is not within the purview of S. 77 (3) (d). If brought by the landlord it could not be within the purview of S. 77 (3) (d) because the landlord on the facts of this case does not admit the tenant to be a tenant and under S. 77 (3) (d) such a suit must be by a landlord to prove that a

tenant has not such a right. As under no circumstances can this suit fall within the purview of S. 77 (3) (d) and no other clause was urged to be applicable, it follows that the suit does not come within S. 77 (3) either and is not barred from the jurisdiction of the civil Court by the operation of S. 77 (3).

In this connection some emphasis was laid on the Privy Council ruling reported in 19 Lah. 514.⁷ In that ruling their Lordships however were dealing with cl. (j) of S. 77 (3). Their Lordships were pleased to construe S. 77 (3) (j) as including not only suits for the amount payable but also suits for the liability to pay. It followed that if a suit were brought to levy haq buha and it was not contested that haq buha was a village cess, or that the person was a proprietor and therefore not liable to pay haq buha, then such a suit would lie within S. 77 (3) (j). It would have been absurd to hold that the converse suit, namely, a suit to have it declared that haq buha was not leviable from any particular person, was however a suit cognizable only by a civil Court. Their Lordships pointed out that emphasis should not be laid on the form of the suit but on the substance of the dispute or matter with respect to which any suit might be instituted. In that case the dispute or matter was the liability to pay haq buha. A suit about that could be brought under S. 77 (3) (j) and, therefore, the converse suit also could only be brought in the revenue Courts. I do not see how this ruling can be held to finish the matter so far as the present suit is concerned in favour of the appellants. Indeed as I read the ruling, if it at all touches this case, it would go in favour of the respondents. Their Lordships pointed out in that case that the suit by a proprietor to have himself declared as such would not be a suit within the category g even though it involved the question of his non-liability to pay haq buha. Their Lordships at p. 524 of that ruling further remarked as follows :

"A suit to take the plaintiff out of any other category than that defined by a custom as to village cesses or expenses would not be rendered incompetent by the section so far as cl. (j) is concerned ; and if the suit was not a suit about the custom or the plaintiff's liability under the custom, it would be equally competent notwithstanding that the plaintiff's rights in the subject-matter of the suit depended upon his proving something which would be inconsistent with his being liable under the custom. After all, the same 'category' may be employed for many different purposes."

The only meaning that I have been able to attach to these words is that if a suit were brought to declare that a man was the proprietor, though the motive of the suit might be to hold himself not liable to pay haq buha, the suit would not be within cl. (j). It would follow, therefore, similarly, that though the motive might be to recover possession of land as an occupancy tenant, yet the suit not being the class of suit prescribed by S. 77 (3) (d), which I have already demonstrated it is not, the suit would not be barred by reason of S. 77 (3). The only question left is the question whether the proviso to S. 77, namely, proviso (1), will, when the Court comes to determine the question of the abandonment of the occupancy tenancy, cause the civil Court to stay its hands and send the suit for decision to the revenue Court. I am unable to see that any such result follows because even in the proviso

7. (188) 25 A.I.R. 1938 P. C. 219 : 175 I. C. 769 : I.L.R. (188) 19 Lah. 514 : 65 I.A. 301 : 82 S.L.R. 835 (P. C.), Mohamed Nawaz Khan v. Bhagta Nand.

it is stated as follows: "It becomes necessary to decide any matter which can under this sub-section (that is, sub-s. (3), of S. 77) be heard and determined only by a revenue Court." But if my reasoning is correct, as previously shown, then it follows that the matter would be heard and determined only by a revenue Court either under S. 77 (3) (d) or S. 77 (3). It follows, therefore, that the proviso has no application to such a suit and I would hold accordingly. This concludes both the questions which were referred to the Full Bench and this is the answer I would give to the questions propounded. I would, therefore, answer the first question formulated in the affirmative and I would answer the second question formulated in the negative.

BHIDE J.—The material facts of the case giving rise to the present reference to a Full Bench may be shortly stated as follows: The plaintiffs were admittedly occupancy tenants of the land in dispute while the defendants are the landlords. According to plaintiffs' allegations, the land was leased by them to the defendants as tenants-at-will. Defendants having failed to pay rent, they sued for their ejectment in a Revenue Court. The defendants resisted the suit on the plea that the plaintiffs had lost their occupancy rights by abandonment. This plea was upheld and the suit was dismissed by the Revenue Court. The plaintiffs then instituted the present suit in a civil Court, alleging that they were occupancy tenants of the land in dispute and that the defendants, to whom the land had been leased by them as tenants-at-will, having denied their title, their possession had become that of trespassers. They therefore sued for their ejectment. The defendants again raised the same plea of abandonment. The trial Court held that the suit was in effect one to establish a claim to occupancy rights and fell within the purview of S. 77 (3) (d), Punjab Tenancy Act. It therefore returned the plaint for presentation to a Revenue Court. In support of this decision, the Court relied on A.I.R. 1926 Lah. 128;⁸ A.I.R. 1926 Lah. 888⁹ and A. I. R. 1922 Lah. 38.¹⁰

On appeal, the learned Senior Subordinate Judge was of opinion that the suit was triable by a civil Court. He pointed out that the fact that the relationship of landlord and tenant had once existed between the parties was admitted and the only question in dispute was whether the plaintiffs' occupancy rights had been extinguished by abandonment. This question of abandonment was in his opinion not within the purview of S. 77 (3), Punjab Tenancy Act. He therefore held that the suit was cognizable by a civil Court. In support of this decision he relied on A. I. R. 1935 Lah. 686¹¹ and 105 I. C. 507.¹ On merits he found in favour of the plaintiffs and decreed the suit. A second appeal having been preferred to this Court, it was held by Din Mohammad J. that the suit was cognizable by a civil Court as the plaintiffs, being out of possession, were not 'tenants' within the meaning of the term as defined in the Punjab Tenancy Act and hence S. 77 (3) (d) could not apply. The learned

Judge relied in support of this view chiefly on the reasoning in 45 P. R. 1891⁴ and 1 P. R. 1911 Rev.¹² He accordingly affirmed the Senior Subordinate Judge's decision decreeing the suit. An appeal was then preferred by the defendants landlords under Cl. 10, Letters Patent, which was heard by a Division Bench consisting of Dalip Singh and Sale J.J. The question of jurisdiction was again raised before the Bench and it was further argued that the matter in dispute between the parties was 'res judicata' by virtue of the decision of the Revenue Court referred to above. The plea of 'res judicata' was however ruled out by the Bench on the ground that it had not been relied on at any earlier stage of the suit and also because there was no evidence on the record to support it. As regards the question of jurisdiction, the Bench pointed out that there was a considerable divergence of authorities on the point and therefore referred the following two questions to a Full Bench for decision:

(1) Is a suit by a dispossessed occupancy tenant to recover possession from his landlord of the land to which he claims the occupancy rights initially within the jurisdiction of the civil Court or not?

(2) Even if the first question be answered in the affirmative, is the civil Court precluded from trying the question whether the occupancy right has been extinguished by abandonment by reason of proviso (1) to S. 77 (3), Punjab Tenancy Act?

When this reference came up before the Full Bench for hearing, it was pointed out at the outset that the plaintiffs in the present case could not be said to have been really 'dispossessed'; for they had themselves, according to their allegations, given possession of the land to the defendants as tenants-at-will. It was agreed that in the first question the expression 'dispossessed occupancy tenant' should be taken as equivalent to 'occupancy tenant who is out of possession.' Coming now to the first question, we have to see whether the suit as framed was triable by a civil Court or a Revenue Court. The plaintiffs were admittedly occupancy tenants of the land in dispute at one time. According to their allegations the land had been given to the defendants as tenants-at-will, but the defendants had denied their title and hence they had brought the present suit for recovery of possession, treating the defendants as trespassers. It is well established that the nature of a suit for the purpose of determining jurisdiction, has to be decided on the basis of the averments in the plaint and not on the basis of any defence that may be taken up. Proviso 1 to S. 77 creates, no doubt, an exception to this rule in so far as it lays down that if in the case of a suit which is originally triable by a civil Court, it becomes necessary to decide any 'matter' which may be heard and determined by a Revenue Court only, under S. 77, Punjab Tenancy Act, the plaint shall be returned for presentation to a Revenue Court. The question whether the present suit would become cognizable by a Revenue Court by virtue of this proviso, will be considered in dealing with the second question. For the purposes of the first question it is only necessary to consider whether the suit as framed was initially triable by a civil Court.

As pointed out above, according to the averments in the plaint, the plaintiffs' suit was for recovery of possession, on the basis of their title as occupancy tenants, the defendants being treated as trespassers. It is true that the defendants in the

8. ('26) 13 A.I.R. 1926 Lah. 128 : 92 I.C. 597 : 27 P.L.R. 24, Nand Ram v. Ishar.

9. ('26) 13 A.I.R. 1926 Lah. 888 : 98 I. C. 389 : 7 Lah. 382 : 27 P. L. R. 519, Jai Karan v. Nathu Ram.

10. ('22) 9 A.I.R. 1922 Lah. 33 : 65 I. C. 520 : 3 Lah. 84, Chuha v. Asa.

11. ('35) 22 A.I.R. 1935 Lah. 686 : 159 I. C. 419 : 37 P.L.R. 378, Jamadar Mansab Ali Khan v. Ram Karan.

12. ('11) 1 P.R. 1911 Rev. : 8 I.C. 733 : 31 P.L.R. 1911, Makhan Singh v. Nanda Singh.

present case were also the landlords. But the suit was not brought against the defendants in their capacity as landlords, but merely as trespassers. Prima facie, therefore the suit was cognizable by a civil Court. It was urged, however, on behalf of the defendants-appellants that the suit was triable by a Revenue Court, as it was a suit by 'tenants' to establish their occupancy rights and therefore fell under cl. (d) of the second group of suits mentioned in S. 77, Punjab Tenancy Act. But a careful consideration of the facts of the case will, I think, be sufficient to show that this was not the nature of the suit. The fact that the plaintiffs were at one time occupancy tenants of the land was not in dispute as already pointed out. There was, therefore, really no question of the plaintiffs having to establish that they had occupancy rights. The defendants pleaded that the occupancy rights had been lost and the burden of proving this fact lay on them. Moreover, the suit was for recovery of possession and not for establishment of occupancy rights. A suit for mere establishment of occupancy rights would be in the nature of a declaratory suit and could therefore only be brought by a person in possession. Clause (d) of S. 77, applies to suits by a 'tenant' to establish occupancy rights or by a landlord to establish that a 'tenant' has no such right. It has been repeatedly held that the clause applies only when the relationship of landlord and tenant is admitted and the nature of the tenancy alone is in dispute, *cf.* 12 Lah. 111.¹³ In such cases, the tenant would naturally be in possession and consequently a declaratory suit would lie. In the present case, the plaintiffs being out of possession, a suit for mere establishment of occupancy rights would not have been competent in view of the provisions of S. 42, Specific Relief Act, and the suit had therefore to be for recovery of possession. It is true that the suit is based on plaintiffs' title as occupancy tenants, but this fact by itself would not justify the suit being classed as a suit for establishing occupancy rights as pointed out in the Full Bench decision of the Punjab Chief Court reported in 9 P. R. 1888,² the facts of which were on all fours with the present case.

It has been, however, suggested that the real 'dispute' between the parties in this case was whether the plaintiffs had still occupancy rights or had lost them by abandonment and in view of this 'dispute' the cognizance of civil Courts was barred by the provisions of sub-s. (3), S. 77, Punjab Tenancy Act, which lays down that no Court except a Revenue Court 'shall take cognizance of any dispute or matter, with respect to which any such suit (i. e. a suit mentioned in S. 77, Punjab Tenancy Act), might be instituted.' Reference was made in this connection to a recent decision of their Lordships of the Privy Council reported in I.L.R. (1938) Lah. 514.⁷ In that case the plaintiff had instituted a suit in a civil Court for a declaration that he was not liable to pay a village-cess known as haq buha to the defendant who was a proprietor of the village. Prior to the institution of the suit, the defendant had already sued the plaintiff in a Revenue Court for recovery of haq buha and it was during the pendency of that suit that the plaintiff had brought the declaratory suit. The question arose whether the plaintiff's declaratory suit was cognizable by a civil or Revenue Court. The Courts in India had given conflicting decisions on the point and it had been

ultimately decided by a Division Bench of this Court on an appeal under Cl. 10 of the Letters Patent that the suit was cognizable by a civil and not by a Revenue Court. Their Lordships of the Privy Council considered this view to be erroneous. According to their Lordships the liability of the plaintiff to pay haq buha was the subject-matter of both the suits and inasmuch as a suit with respect to this subject-matter could be instituted under cl. (j) of S. 77 with respect to it, the cognizance of the suit by a civil Court was barred. In other words, their Lordships considered the form of the suit to be immaterial and held that a suit would be outside the jurisdiction of a civil Court if one or the other of the parties to it could institute a suit with respect to the real subject-matter in dispute between the parties, which came under one or the other of the various categories of suits mentioned in sub-s. (3) of S. 77. This decision puts, no doubt, a wide construction on the provisions of sub-s. (3) of S. 77; but I do not think it helps the appellants in this case. In order to apply the principle laid down by their Lordships to the facts of this case, we must see (i) what is the real subject-matter in dispute in the present case and (ii) whether any suit falling under sub-s. (3) of S. 77 could be instituted with respect to it. As already stated, the subject-matter of the real dispute in the present case is whether the occupancy rights enjoyed by the plaintiffs had been lost by abandonment as alleged by the landlords. We have therefore to see whether any suit under S. 77 (3) could be instituted with reference to this subject-matter by one or the other of the parties to the suit. Now, there is no specific clause in S. 77 applicable in terms to this subject-matter. The only clause which has been suggested on behalf of the appellants as applicable to it is cl. (d). Clause (i) was also suggested at first, but the learned counsel for the appellants gave up this position in the course of arguments as he realized that this position was wholly untenable,—there being no dispute about the 'conditions' of the tenancy. We need therefore consider cl. (d) only. That clause covers suits of two kinds viz. (i) suits by a tenant to establish occupancy rights; (ii) suits by a landlord to establish that a tenant has no occupancy rights.

In the present instance, if the plaintiffs had to bring a suit with reference to the subject-matter in dispute, they would have had to sue for a declaration that they had not lost their occupancy rights by abandonment. But they could not sue for a mere declaration, as pointed out above, as they were out of possession and were therefore entitled to the consequential relief for recovery of possession. No suit with respect to the subject-matter in dispute could therefore, have been brought by the plaintiffs tenants under part 1, clause (d). As regards part 2 the landlords, being in possession, could no doubt sue for a declaration that the present plaintiffs were not their occupancy tenants. But such a suit could not fall under part 2 of cl. (d), as the present plaintiffs, who would have been defendants to such a suit by the landlords were no longer occupying the status of tenants, according to the allegations of the landlords,—having lost that status by 'abandonment.' In other words, according to the averments in the plaint, in such a suit by the landlords the suit would have been not against 'tenants' but against persons who were merely claiming to be occupancy tenants and therefore it could not fall under cl. (d). No suit falling under cl. (d) with respect to the real subject-matter in dispute in this case would thus appear to be competent by either party. It follows, therefore, that the present case is not taken out of

13. (81) 18 A. I. R. 1931 Lah. 362 : 132 I. C. 15 : 12 Lah. 111 : 32 P. L. R. 329. Sham Singh v. Amarjit Singh.

a the cognizance of the Civil Court by the rule laid down by their Lordships of the Privy Council in I.L.R. (1938) Lah 514.⁷

In view of the above finding I consider it unnecessary to discuss whether the present suit would not fall under cl. (d), also on account of the interpretation placed on the word 'tenant' as defined in the Punjab Tenancy Act, in 45 P.R. 1891.⁴ It was contended on behalf of the respondents that the plaintiffs in this case could not be considered to be 'tenants' at all as they were admittedly out of possession and hence cl. (d) would be inapplicable. It was held in 45 P.R. 1891,⁴ that no person could be considered to be a 'tenant' within the definition of that term in the Punjab Tenancy Act unless he 'held' land, i. e., was in possession thereof, at the relevant time,—except in the case of a dispossessed tenant, who institutes a suit under S. 50 of the Act. b The present suit was lodged more than one year after the alleged 'dispossession' and does not fall under S. 50. Consequently, according to the interpretation placed on the term 'tenant' in 45 P.R. 1891,⁴ the plaintiffs in the present case could not be held to be 'tenants'. It was therefore argued by the learned counsel for the respondents that according to the above interpretation of the word 'tenant' any suit brought by or against them could not fall under cl. (d) of S. 77. The learned counsel for the appellants challenged the correctness of the interpretation placed on the term tenants in 45 P.R. 1891⁴ and contended that the meaning of the term is wider under general law and there is no justification for placing such a narrow interpretation on the term, as the word 'hold' according to its dictionary meaning does not necessarily connote possession, but also means 'derive title from.' c There was a great deal of controversy over this question before us and various rulings were cited on both sides. With the greatest respect for the view taken in 45 P.R. 1891,⁴ I must say that the point seems to me to be not free from doubt or difficulty. I consider it, however, unnecessary to discuss the point for the purpose of this appeal as I have come to the same finding viz., that the subject-matter of the present suit does not fall within the purview of cl. (d) of sub-s. (3) of s. 77,—though my finding is based on different grounds. For the reasons given above, my conclusion on the first question is that the present suit as laid was cognizable by a civil Court and I would answer the question accordingly. I now come to the second question, viz., whether even if the suit was initially triable by a civil Court, it became triable by a Revenue Court by virtue of proviso 1 to S. 77. d In order to determine this point, it is necessary to consider the wording of the substantive portion of S. 77 as well as of the proviso thereto. The sub-section and the proviso run as follows:

"(3) The following suits shall be instituted in and heard and determined by Revenue Courts, and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted:

Provided that (1) where in a suit cognizable by and instituted in a civil Court it becomes necessary to decide any matter which can under this sub-section be heard and determined only by a Revenue Court, the civil Court shall endorse upon the plaint the nature of the matter for decision and the particulars required by O. 7, R. 10, Civil P. O., and return the plaint for presentation to the Collector."

It may be mentioned here that it was noticed in the course of the arguments that the word 'such'

before the word 'suit' in the substantive portion of the section was omitted in some of the books referred to by the learned counsel before us. It was, however, ascertained from the Act as published originally in the Gazette of India (see p. 88 of the Gazette of India, 24th September 1887, Part 4) that the word 'such' was in the Act as passed and its omission in the Act as published in the Punjab Record 1887 and some other books was an error. The omission of the word would not perhaps make much difference so far as the meaning of the sub-section is concerned, but the word 'such' certainly serves to make the meaning clearer. Coming now to proviso (1), it will be noticed that there is some difference in the language used in the substantive part of the sub-section and that of proviso (1). The substantive part refers to 'any dispute or matter with respect to which any such suit (i. e., a suit referred to in the various clauses of sub-s. (3))' might be instituted while the proviso refers to the situation when 'in a suit cognizable by and instituted in a civil Court, it becomes necessary to decide any matter which can under this sub-section be heard and determined only by a Revenue Court.'

It will appear that the word 'dispute' is omitted in the proviso and only the word 'matter' is used therein. Was the omission of the word 'dispute' intentional and does the omission make any difference? So far as I can see, the word 'matter' is more comprehensive than the word 'dispute'. A matter on which the parties are 'at issue' may be described as a 'dispute', but when the parties are not at issue, the matter could only be described as a 'matter'. The object of the proviso perhaps was that whether the parties are or are not at issue on a particular matter, if the matter is such that it can only be heard and determined by a Revenue Court and if a finding has to be given thereon the Court should adopt the procedure laid down in the proviso. It need hardly be pointed out that even if a point is not disputed, a finding may still be necessary and may have to be given on the admission of a party. However, the point is not of importance for the purpose of this case and need not be pursued further. The proviso must obviously be read with the sub-section. The words 'no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted' occurring in the sub-section, seem to be comprehensive enough to include disputes or matters, whether they are raised in the averments in the plaint or arise out of the pleas of the defendants. If they are raised in the plaint, the suit would not be initially cognizable by a civil Court. But, if they arise out of the pleas of the defendants, the suit may be initially cognizable by a civil Court, but would cease to be so when the Court finds that there is a dispute or matter with respect to which a suit falling within one of the clauses of the sub-section could be instituted. The suit with which their Lordships of the Privy Council had to deal in I.L.R. (1938) Lah. 514⁷ fell under the former category and it is noteworthy that their Lordships held the suit to be cognizable by a Revenue Court on the basis of the above-mentioned words in the sub-section itself and not on the basis of proviso 1.

In the suit before their Lordships of the Privy Council, the plaintiff had sued (as already stated above) for a declaration that the defendant was not entitled to demand any amount from the plaintiff as haq buha. This suit raised a dispute with regard to plaintiff's liability to pay haq buha, which was admittedly a village cess. According to

a cl. (j) of S. 77, suits for sums payable on account of village cesses or expenses are cognizable by a revenue Court only. Their Lordships held that although the plaintiff had merely sued for a declaration as to his liability to pay a village cess, the subject-matter of the suit was one with respect to which a suit could be instituted under cl. (j) of S. 77 and hence the suit was cognizable by a revenue Court. In other words, their Lordships seem to have held the suit to be cognizable on the basis of the averments in the plaint itself and not on account of the pleas of the defendants. It was apparently for this reason that their Lordships merely dismissed the suit, holding it to be not triable by a civil Court and did not adopt the procedure laid down in proviso (1). For proviso (1) deals with only that limited class of cases in which the suit as laid is cognizable by a civil Court, but it becomes necessary (presumably on account of the pleas raised by the defendants or possibly even on account of any counter pleas which may be raised subsequently by the plaintiffs in replication) to decide any matter which can be heard and determined only by a revenue Court, under sub-s. (3). The proviso requires that where this situation arises, the Court shall return the plaint for presentation to the revenue Court (Collector), endorsing therein the nature of the matter for decision and the particulars required by O. 7, R. 10, Civil P. C. Before the enactment of the proviso, the Courts had taken divergent views as to the procedure to be adopted when such a situation arose. Sometimes the suit was held to be not triable by a civil Court and therefore merely dismissed, while sometimes the pleas raised by the defendants were ignored as outside the cognizance of the civil Court and the case was decided on the other pleas. The matter came up before a Full Bench of the Punjab Chief Court in 76 P. R. 1909¹⁴ and the decision of the Full Bench was that the pleas should simply be ignored by the civil Court in such cases. This was obviously an anomalous and unsatisfactory state of affairs (and this was recognized in the judgment) but the Court was constrained to give the decision owing to the law as it stood at the time. The Legislature, therefore, intervened and enacted the proviso with a view to lay down a procedure for dealing with this class of cases.

d In order to determine whether the present suit becomes cognizable by a revenue Court owing to the abovementioned proviso, we must therefore see if the defendants have raised any pleas, which make the suit cognizable by a revenue Court. Now the only relevant plea of the defendants in this respect is the alleged extinction of the occupancy rights of the plaintiffs by abandonment. Is this plea then a 'matter' which can be heard and determined by a revenue Court only, as required by the proviso? This would obviously be the case only, if a suit with respect to it could be instituted under one of the clauses of sub-s. (3) of S. 77. In other words, the requirement of the proviso in this respect is substantially the same as that laid down in the main portion of the sub-section, viz., 'any dispute or matter with respect to which any such suit might be instituted' although the phraseology of the proviso is different from that of the sub-section. We have, therefore, to come back to the same point as was discussed with reference to the first question—viz., whether any suit falling under sub-s. (3), could

be instituted with respect to the above plea of the defendants. For reasons already given, I hold that no such suit could be instituted and therefore the proviso does not apply.

It was, however, urged on behalf of the appellants that all that need be considered for the purpose of the proviso is whether any suit could be instituted under the proviso with respect to the 'matter' raised by the pleas of the defendants and it is unnecessary to consider further whether such a suit could be instituted by one of the parties to the suit against the other at the time this plea was raised. It was contended that the plea of the defendants was that plaintiffs were no longer occupancy tenants and as the question whether a person is or is not an occupancy tenant is the subject-matter of suits falling under cl. (d), that clause should be held to apply. In support of the above contention the learned counsel for the appellants relied on the observations of some of the Judges who decided the Full Bench case reported in 9 Lah. 38.¹ The present reference to a Full Bench has been made partly on account of these observations and it is therefore necessary to consider these observations. It may be stated at the outset that the facts of the case reported in 9 Lah. 38¹ were different from those of the present case. The plaintiffs in that suit were tenants to whom a notice of ejectment had been issued under S. 43, Punjab Tenancy Act, and who after having failed in a suit to contest the notice had been ejected from the land in pursuance of the decree obtained by the landlords. They then instituted a suit for possession of the land in a civil Court on the ground that they were occupancy tenants and the question was raised whether the suit was cognizable by a civil or revenue Court. The only question referred to the Full Bench was:

"Whether a civil Court has jurisdiction to try a suit brought by a person, who has been dispossessed from his tenancy after a notice issued to him under S. 43, Tenancy Act, and who has been unsuccessful in a suit under S. 45 to contest his liability to ejectment, for possession of the land from which he has been ejected on the ground that he has a right of occupancy therein, and whether S. 77 (3) (d) of the Act bars such a suit or not."

It was held by the Full Bench that the suit was rightly instituted in a civil Court, but that the civil Court would have to deal with it in accordance with the procedure prescribed by proviso (1) to sub-s. (3) of S. 77, i.e., its jurisdiction would continue until it becomes necessary to decide a matter which can under the sub-section be decided by a revenue Court only. The plea of *res judicata* had also been raised in that case but this plea had not yet been adjudicated on. The question whether proviso (1) did or did not apply to the case did not therefore actually arise at the stage and was not actually decided by the Full Bench. But some of the learned Judges have undoubtedly made observations to the effect that the proviso would apply if the plea of *res judicata* did not succeed. The Full Bench case was decided by five Judges, viz., Broadway, Fforde, Addison, Tek Chand and Dalip Singh JJ. Broadway J. who delivered the main judgment merely observed that 'in cases of this nature' proviso (1) to S. 77 (3) is applicable and renders it necessary for the civil Court 'to act thereunder.' He did not however discuss the matter further and it is not very clear on what grounds he considered the proviso to be applicable; but so far as one can gather the learned Judge considered the proviso to be applicable because the 'matter' to be decided in the suit was the existence of an occupancy tenancy. The learned Judge

¹⁴ (209) 76 P. R. 1909 : 86 P. L. R. 1910 : 119 P. W. R. 1909 : 3 I. O. 498 (F. B.), Haji Muhammad Bahbah v. Bhagwan Das.

a does not appear to have considered whether a question of this type is always triable by a revenue Court or only when it arises between parties occupying the status mentioned in cl. (d) of sub-s. (3) of S. 77.

Florde J. merely agreed with Broadway J., Addison J. seems to have discussed the question at some length. His view apparently was that the plaintiffs were out of possession and therefore not 'tenants' and hence the suit was rightly instituted in a civil Court; but he considered that the suit would have to go to a revenue Court, if it became necessary to decide the matter raised by the plaintiffs, viz., 'whether they are in fact tenants and as such have occupancy rights.' The learned Judge held this matter to fall under cl. (d) of sub-s. (3) of S. 77. But here again the learned Judge does not appear to have considered the question of the status of the parties as required by cl. (d). With all respect b I must say that I do not see how the question of the existence of an occupancy tenancy can be held to be one which can be heard and determined by a revenue Court only unless it arose between the parties who had the status mentioned in cl. (d). Tek Chand J. agreed with Broadway and Addison JJ., but he too did not discuss the question of the status of the parties as laid down in cl. (d). Dalip Singh J. on the other hand seems to have taken a contrary view. The discussion of the point is of a general character, but such appears to be the trend of his judgment.

It will, thus, appear that the observations of some of the learned Judges who decided 9 Lah. 381 on which reliance is placed by the learned counsel, were really in the nature of obiter dicta, and were not based on a full consideration of the requirements of cl. (d) perhaps because no occasion had yet arisen c for deciding that point. One of the learned Judges who discussed the question generally (Dalip Singh J.) on the other hand seems to have held a contrary opinion. The learned counsel for the appellants referred to some other rulings also in which it seems to have been assumed without discussing the matter fully that whenever any question of the existence of occupancy rights arose the case became triable by a revenue Court : see e.g. 3 Lah. 8410 and A. I. R. 1926 Lah. 388.2 But not a single case was cited in which the requirements of cl. (d) and of the proviso were fully discussed and a conclusion was arrived at that it was unnecessary to consider the status of the parties in determining whether the matter falling for decision under the proviso was one which could be heard and determined by a revenue Court only. On the other hand, the interpretation placed on cl. (d) of sub-s. (3) of S. 77 in 12 Lah. 11113 d (the soundness of which was conceded by the learned counsel for the appellants) fully supports the conclusion arrived at above.

The argument that a suit becomes cognizable by a revenue Court under cl. (d) merely because there is a question of the existence of an occupancy tenancy seems to me to be wholly untenable. The object of the Punjab Tenancy Act evidently is to take certain disputes between landlords and tenants and other cognate matters out of the jurisdiction of civil Courts. It is well established that an enactment of this nature which restricts the jurisdiction of civil Courts ought to be construed strictly. In order to see therefore whether cl. (d) of S. 77 applies to the circumstances of a case, it is necessary to see whether all the requirements of the clause are fulfilled. It is therefore necessary to consider not only the nature of the dispute, but also the status of the parties as mentioned in the clause. For instance, if an occupancy tenant sues to eject a mere trespasser from his land, he may have to prove that

he is an occupancy tenant, if the fact is denied by the defendant. But is that any reason for holding the case to fall under cl. (d)? The answer must, I think, be obviously in the negative. The intention of cl. (d) clearly is that only those suits should be held to fall under it which arise between parties occupying the status mentioned in the clause. It is only when this condition is satisfied that the dispute about the existence of an occupancy tenancy ceases to be cognizable by a civil Court. The words "any dispute or matter with respect to which any such suit might be instituted" appearing in sub-s. (3) are very significant. There must be possibility of such a suit at the time when the dispute or matter is raised. The object of this provision evidently is to prevent circumvention of the Punjab Tenancy Act by taking any 'dispute' or 'matter' to a civil Court which the Legislature has thought it fit to leave to the decision of the revenue Courts. The language f used in the proviso is somewhat different from the language of the corresponding provision in sub-s. (3), but its effect is the same as already pointed out. Unless therefore it is shown in any particular case that there is a 'matter' to be decided with respect to which one or the other party could institute a suit which would be cognizable by a revenue Court only, the jurisdiction of the civil Courts will not be ousted.

It has been already held above that the requirements of cl. (d) of S. 77 as regards the status of the parties are not fulfilled in respect of the real subject-matter of the dispute between them in this case. I would accordingly answer the second question in the negative. In the end, reference may be made to one point which was raised on behalf of the appellants in the course of the arguments. It g was urged that the present action in the civil Court was not maintainable in view of the provisions of S. 50 and S. 77 (g), Punjab Tenancy Act. This argument was based on a Full Bench decision of the Punjab Chief Court reported in 90 P.R. 1918.9 This was not however one of the points referred to the Full Bench and was, therefore, not allowed to be argued.

ABDUL RASHID J. — I have had the advantage of reading the judgments of my brothers Dalip Singh and Bhide. I find myself in agreement with my brother Dalip Singh, and have nothing to add.

MUHAMMAD MUNIR J. — I also agree with Dalip Singh J.

TEK CHAND J. — I have had the advantage of reading the judgments prepared by my learned brethren, Dalip Singh and Bhide JJ. and agree with them that the first question referred to the Full Bench must be answered in the affirmative and the second in the negative. There is no doubt that the suit, as framed, was properly instituted in the civil Court. In order to determine whether the Court, in which a suit is brought, has or has not jurisdiction, initially, to entertain it, what has to be seen is the allegations in the plaint, the cause of action disclosed therein and the relief claimed. It is common ground that defendants are the owners of the land and the plaintiffs were occupancy tenants under them and were in possession as such till 1927. According to the plaint, in that year the plaintiffs gave the land to the defendants for cultivation as tenants-at-will under them on payment of rent and put the defendants in actual possession for this purpose. It was averred that the defendants paid the rent for some time but were now denying the tenancy-at-will and were in wrongful possession as trespassers. The plaintiffs, therefore, prayed that a

a decree for possession of the land be passed in their favour.

It is not denied for the defendants that a suit, framed as above, is cognizable by a civil Court. It is however contended that we have not merely to look to the form in which the claim is put but to its substance and that in this case what the plaintiffs were really seeking was to establish their claim that the occupancy rights, which they once had but which had become extinct by abandonment in 1927 were still subsisting. It was accordingly urged that the suit was of the class described in cl. (d) of sub-s. (3) of S. 77 and, as such, was exclusively triable by a revenue Court. Clause (d) refers to suits "by a tenant to establish a claim to a right of occupancy or by a landlord to prove that a tenant has not such a right." Assuming, that the real nature of the suit is as contended for by the defendants' learned counsel, the suit would not fall within cl. (d). That clause contemplates that the relationship of landlord and tenant, admittedly subsists between the parties; and the dispute is as to the nature of the tenancy, that is to say, whether the tenant is a mere tenant-at-will or is a tenant having a right of occupancy and if so, of what class. If the parties are at issue on the question as to whether the plaintiff is a "tenant" at all, cl. (d) would not apply. See in this connexion 12 Lah. 111,¹³ and the rulings cited therein, the correctness of which has not been questioned by the appellants' counsel.

Further, the suit covered by cl. (d) is a suit for a declaration and not a suit for possession. The leading case on this point is 9 P. R. 1888,² decided by a Full Bench of the Chief Court under S. 45 (a) of Act 18 of 1884 (which corresponded to S. 77 of the present Punjab Tenancy Act), the facts of which were on all fours with those of the case before us. It was held in that case that where a plaintiff asked to be placed in possession of land on the ground that he was entitled to hold such land as a tenant with a right of occupancy, his suit is not one "by a tenant to establish a claim to a right of occupancy" and so cognizable by Revenue Courts only. It was observed that it was true that in a case of this kind it was essential to the obtaining of the relief asked for that a plaintiff should "establish his claim to a right of occupancy," but that this question of title arises only incidentally. The cause of action alleged by the plaintiff is being wrongfully deprived of, or kept out of the cultivating possession of certain lands, and the relief he asked for is a restoration to such possession. This is a relief which the civil Courts alone can give him. The definition of "tenant" in the Tenancy Act and other changes made by it have not affected the correctness of 9 P. R. 1888,² indeed, it was re-affirmed by other Full Benches of the Chief Court in 44 P. R. 1891³ and 45 P. R. 1891,⁴ in cases decided under that Act. A Full Bench of five Judges of the High Court in 9 Lah. 38,¹ has endorsed this conclusion, and nothing said before us leads me to come to a contrary decision. With great respect, I entirely agree with the view expressed by Plowden J. in 45 P. R. 1891,⁴ that in order to constitute the relation of "landlord" and "tenant" as defined in the Tenancy Act, the latter must not merely have the "right to hold" but must also have entered into possession as such, and further that the continuance of possession (actual or constructive) is necessary for the continuance of the relation, except for purposes for which the legislature has laid down the contrary, e.g., in cases covered by ss. 40 and 50A of the Act. This matter has been discussed fully by my learned brother

Dalip Singh and I entirely agree with his reasoning and conclusion.

The second question relates to the effect of proviso (3) to S. 77 (added by Act 3 of 1912) which lays down that where in a suit cognizable by and instituted in a civil Court it becomes necessary to decide any "matter" which can under this sub-section be heard and determined by a revenue Court a civil Court shall endorse upon the plaint the nature of the "matter" for decision and return the plaint for presentation in the revenue Court. The question, therefore, is whether the defendants' pleas in this case raised a "matter" in respect of which a suit, if brought by the defendants would fall within any of the clauses of sub-s. (3) of S. 77. The defendants' learned counsel is unable to refer to any clause other than cl. (d). As from above the first part of the clause does not apply, but it is argued that if the defendants were to bring a suit against the plaintiffs, based on the allegations contained in their pleas in this case, it would be a suit falling under the second part of that clause. But in order to make the second clause applicable it is necessary that the plaintiff in the hypothetical suit (i.e., the present defendants) recognize the defendants in that suit (i.e., the present plaintiffs) as "tenants" under him and admit that they are in possession as such, but that their status is not of occupancy tenants but is of tenants-at-will or tenants for a fixed period or tenants of some other kind. Now this is not the defendants' plea in the present case. They altogether deny that the relationship of landlord and tenants exists between them and the plaintiffs, and it is common ground that the plaintiffs are not in actual or constructive possession. The defendants no doubt admit that the plaintiffs were once occupancy tenants under them, but their case is that the tenancy became extinct in 1927 since when the plaintiffs have had nothing whatever to do with the land. It cannot, therefore, be said that on the defendants' pleas it has "become necessary" to decide a "matter" which, under sub-s. (3), can be heard and determined by the revenue Courts only. The answer to the second question is in the negative.

G.N./R.K.

Answer accordingly.

* A. I. R. (29) 1942 Lahore 228

FULL BENCH

TEK CHAND, DIN MOHAMMAD AND

SALE JJ.

Faqir Chand — Decree-holder —

Petitioner ^b

v.

Deputy Commissioner, Jullundur, and
another, Judgment-debtor —

Respondents.

Civil Revn. Case No. 755 of 1941 (Formerly Exn. Second Appeal No. 568 of 1941), Decided on 13th July 1942, case referred by Din Mohammad J., D/- 11th March 1942.

* (a) Civil P. C. (1908), S. 115—S. 115 covers orders passed by subordinate Court acting judicially under powers conferred on it by special Act—Order of appellate Court accepting Deputy Commissioner's revision petition under S. 21A, Punjab Alienation of Land Act, is open to revision under S. 115, Civil P. C. : ('87) 24 A.L.R. 1937 Lah. 637 = 169 I.C. 430, **OVERRULED**.

Section 115 covers cases in which a subordinate Court has passed orders, acting judicially in exer-

cise of the powers conferred on it by special Acts :
(17) 4 A.I.R. 1917 P.C. 71, *Rel. on.* [P 231 C 1]

The Court which deals with a revision petition under S. 21A, Punjab Alienation of Land Act, acts judicially and is a "Court subordinate to the High Court" and, according to the plain wording of S. 115, any order passed by such Court is open to revision by the High Court. Consequently an order of the appellate Court accepting a revision petition by the Deputy Commissioner under S. 21A, Punjab Alienation of Land Act, is open to revision by the High Court under S. 115. Section 21A, Punjab Alienation of Land Act while it confers upon the Deputy Commissioner a special right of applying to the High Court on the revision side does not take away the right of the aggrieved party of invoking the revisional jurisdiction of the High Court under the general law of the land : ('37) 24 A.I.R. 1937 Lah. 637=169 I.C. 430, *OVERRULED* ; 12 P.R. 1911, *Approved* ; *Case law reviewed.* [P 230 C 2 ; P 231 C 1, 2]

C. P. C. —

(40) Chitaley, S. 115, N. 6.

(41) Mulla, Page 415, Note "Subordinate Court."

(b) Punjab Alienation of Land Act (13 of 1900), S. 21A — Under S. 21A Court has to "find" whether decree or order impugned by Deputy Commissioner infringes Act—Facts not apparent on face of record — Court must frame issue, institute enquiry and come to decision on it—Court not making any enquiry of its own but merely relying and basing its decision on Naib Tehsildar's report to Collector in mutation proceedings—Court acts illegally and with material irregularity justifying interference under S. 115, Civil P. C.

Section 21A requires the Court "to find" whether by the decree or order, which the Deputy Commissioner impugns, the provisions of the Punjab Alienation of Land Act had been infringed and if in order to determine this question it is necessary to go into the facts which are not apparent on the face of the record, it is not only competent to Court of revision, but it is its duty, to frame an issue, institute an enquiry and come to a decision on it : ('16) 8 A.I.R. 1916 Lah. 1 (F.B.) ; ('27) 14 A.I.R. 1927 Lah. 897 and ('35) 22 A.I.R. 1935 Lah. 901, *Expl.* [P 232 C 2]

Where the Court does not make any enquiry of its own but merely relies on a report submitted by the Naib-Tehsildar to the Collector in mutation proceedings and bases its decision on that report, it acts illegally and with material irregularity justifying interference under S. 115, Civil P. C.

[P 232 C 2]

C. P. C. —

(40) Chitaley, S. 115, N. 12, Pt. 60.

(41) Mulla, Page 424, Pt. (a).

O. L. Aggarwal — for Petitioner.

Indar Dev Dua and A. R. Kapur — for Respondents (Deputy Commissioner and Judgment-debtor, respectively).

TEK CHAND J.—The facts of the case which have given rise to this reference to the Full Bench are as follows : Buta Singh (Respondent 2) is a Jat of mauza Dhaipur, District Jullundur, and as such is a member of a notified agricultural tribe under the Punjab Alienation of Land Act. By a deed, executed on 22nd January 1932, he mortgaged to the petitioner Faqir Chand, who is a non-agriculturist, certain properties, described as two houses and a taur, for Rs. 305-15-9. It was stated in the deed

that the mortgaged properties were situate in the abadi and in a private partition had fallen to the share of Buta Singh mortgagor and that he was the sole and exclusive owner. On 21st August 1936, Faqir Chand instituted a suit against Buta Singh for recovery of the amount due on foot of the mortgage by sale of the mortgaged properties. In this suit, a preliminary decree was passed *ex parte* on 9th November 1936, which was made final on 11th June 1937. The decree-holder took out execution and, after notice to the judgment-debtor under O. 21, R. 66, Civil P. C., a warrant was issued for sale of the properties, which were described as two houses and a taur, as in the mortgage deed and the decree. An auction was held on 6th December 1937, at which the properties were sold for Rs. 491 to Faqir Chand decree-holder, whose bid was the highest. The sale was confirmed by the executing Court on 28th January 1938. The judgment-debtor was fully aware of all these proceedings but he did not raise any objection to the sale or its confirmation.

The sale certificate was issued in favour of Faqir Chand (decree-holder) as auction purchaser on 2nd February 1938 and in this also, the properties were described as houses and taur situate in the abadi of mauza Dhaipur. The decree-holder then applied to the executing Court for possession of the houses and the taur and a warrant for delivery of possession was issued. On 27th March 1938, the bailiff submitted his report that possession of the houses had actually been delivered to the decree-holder, the judgment-debtor Buta Singh having removed his belongings from it and the auction-purchaser Faqir Chand having put his lock on the outer door. This report was thumb-marked, among others, by Buta Singh himself.

On 17th November 1939, the Patwari put up a mutation for removal of the name of Buta Singh from the proprietary column and substitution of that of the decree-holder, stating that in accordance with the decree of the civil Court possession had been taken by Faqir Chand decree-holder who was in actual possession of the properties. The lambar-dar of the village testified to these facts and endorsed the Patwari's report. The Girdawar, however, noted that the properties in question were "land" as defined in the Alienation of Land Act, belonging to a member of a notified agricultural tribe and, therefore, could not be sold to a non-agriculturist in execution of the decree of a civil Court. The papers were submitted to the Collector, who directed an enquiry by the Naib Tehsildar. While these proceedings were going on, Buta Singh, on 20th July 1940, submitted an application stating for the first time, that the houses were situate on a part of the shamlat, of which the taur also formed a part, that the decree-holder had got them sold fraudulently, that, further, one of the houses was his residential house and the other house and the taur were used for agricultural purposes and for these reasons, also, they were not liable to attachment and sale in execution of the decree. The Naib Tehsildar submitted his report to the Collector to the effect that the properties in question were really "land" as defined in the Act and had been wrongly sold.

On 23rd August 1940, the Deputy Commissioner lodged a petition under S. 21A, Punjab Alienation of Land Act, in the Court of the Senior Subordinate Judge, Jullundur, for revision of the order by the Subordinate Judge confirming the sale of the properties in execution of the decree in the mortgage suit. The decree-holder, Faqir Chand, contested the

a application urging, inter alia that the properties were not "land" nor were they part of the shamilat, but were owned exclusively by Buta Singh. The Senior Subordinate Judge, however, without holding an enquiry of his own as to the real nature of the properties and relying mainly on the report of the Naib Tensildar, accepted the Deputy Commissioner's petition and passed an order setting aside the sale. The decree-holder Faqir Chand has moved this Court under S. 115, Civil P. C., and S. 44, Punjab Courts Act, for revision of the order of the Senior Subordinate Judge setting aside the sale on two grounds: (1) that the Senior Subordinate Judge exceeded his jurisdiction in accepting the Deputy Commissioner's petition for revision under S. 21A, as that section is "intended merely to enable correction of a decree or order, which on the face of the record, infringes the provisions of the Act," and that it does not apply to a case (like the present) where the alleged infringement of the provisions of the Act does not appear, ex facie, in the decree or the record, but has to be ascertained after enquiry, and (2) that, in any case, the Senior Subordinate Judge did not hold any enquiry into the nature of the properties in question and did not give proper opportunity to the petitioner to prove that the properties were houses and taur, situate in the abadi and not used for agriculture, or pasture or purposes subservient to agriculture.

b In support of the first contention reliance was placed on certain remarks in a Full Bench decision of the Chief Court reported in 52 P. R. 1916.¹ When the case came up for hearing before my learned brother, Din Mohammad J., sitting in Single Bench, a preliminary objection was raised on behalf of the Deputy Commissioner that an order passed by a Subordinate appellate Court accepting the Deputy Commissioner's revision petition under S. 21A, Punjab Alienation of Land Act, was not open to revision by this Court under S. 115, Civil P. C., as has been laid down in A. I. R. 1937 Lah. 637.² The learned Judge being doubtful of the correctness of this decision and also of the remarks in 52 P. R. 1916¹ above referred to, on which the petitioner relied has referred the case to a Full Bench.

c It will be convenient to take first the preliminary objection raised by the respondent that the order of the Senior Subordinate Judge is not open to revision by this Court under S. 115, Civil P. C. As stated above, the preliminary objection is supported by A. I. R. 1937 Lah. 637² decided by Addison J. sitting in Single Bench. The learned Judge based this conclusion on the ground that while S. 21A, cl. (3) expressly provides that where the appellate Court, to which the Deputy Commissioner has preferred a revision petition, passes an order rejecting such petition the Deputy Commissioner may, within two months after the date upon which he is informed of such order, apply to the High Court for revision thereof, there was no provision for a similar revision being preferred to the High Court if the Deputy Commissioner's petition had been accepted by the appellate Court. This decision is not in accord with 12 P. R. 1911,³ in which the identical objection had been

raised and overruled. That case was regarded in the Chief Court and this Court as the ruling authority on the subject for over 25 years, but there is no reference to it in the judgment in A. I. R. 1937 Lah. 637.² Apparently, the attention of the learned Judge, who decided the latter case, was not drawn to it. In 12 P. R. 1911³ Shah Din J. who delivered the judgment of the Division Bench discussed the matter at length, and as I am in complete and respectful agreement with his reasoning and conclusion, I take the liberty of quoting the following passage from his judgment:

"Section 21A of Act 13 of 1900 lays down special rules of procedure for the benefit of the Deputy Commissioner concerned, who is empowered to apply for the revision of a decree or order passed by a Court in contravention of any of the provisions of the Act to the Court, if any, to which an appeal would lie from such decree or order or in which an appeal could have been instituted at the time when the decree or order was passed, or in any other case to the Chief Court. If the appellate Court passes an order rejecting the Deputy Commissioner's application, he may, within a prescribed period, apply to the Chief Court for revision thereof. But for the enactment for this latter provision the Deputy Commissioner would not have been able to invoke the revisional jurisdiction of this Court and, therefore, the Legislature thought it necessary to enact S. 21A of this Act. The enactment of this special provision for the benefit of the Deputy Commissioner, however, does not take away the right which a party to a suit or an execution proceeding has of applying to this Court under the general provisions of S. 70, Punjab Courts Act, for revision of an order or a decree passed in a case in which no appeal lies to this Court. Section 21A, Alienation of Land Act, while it confers upon the Deputy Commissioner a special right of applying to this Court on the revision side, does not expressly negative the exercise of any such right on the part of an aggrieved party; and it would certainly be imputing to the Legislature a most unreasonable intention to hold that the right possessed by such a party of invoking the revisional jurisdiction of this Court under the general law of the land is taken away by necessary implication simply because the aforesaid section does not confer such power on such party equally with the Deputy Commissioner. The contention of the respondent's counsel, if accepted, would work obvious injustice and lead to grotesque consequences, and we are not prepared to accede to it, unless compelled to do so by the plain language of an enactment. We have been referred to no such enactment, and we, therefore, overrule the preliminary objection."

The learned counsel for the respondent contended that S. 21A creates a special jurisdiction in the appellate civil Court to revise, at the instance of the Deputy Commissioner, a decree or order passed by a Subordinate Court, to which he was not a party, and, therefore, orders passed under it are not subject to the ordinary revisional powers of the High Court under S. 115. It was urged that in such a case the power to revise must be conferred expressly by the Legislature and as the Punjab Alienation of Land Act is silent on the point, it must be held that the order of the Senior Subordinate Judge is final. This argument is without any substance. Section 115, Civil P. C., is very wide in its terms and gives the High Court the power "to call for the record of any case which has been decided by any Court subordinate to it" and in which no appeal lies. The Senior Subordinate Judge (or the District Judge, as the

1. ('16) 3 A. I. R. 1916 Lah. 1 : 32 I. C. 446 : 52 P. R. 1916 : 85 P. L. R. 1917 (F.B.), Feroz Din v. Mt. Barsi.

2. ('37) 24 A. I. R. 1937 Lah. 637 : 189 I. C. 430, Jhangli Ram Boda Ram v. Collector, Dera Ghazi Khan.

3. ('11) 12 P. R. 1911 : 9 I. C. 396 : 6 P. L. R. 1911 : 23 P. W. R. 1911, Asa Singh v. Duts.

a case may be) who deals with a revision petition under S. 21A, Alienation of Land Act, is acting judicially and is a "Court subordinate to the High Court," and, according to the plain wording of S. 115, any order passed by such Court is open to revision by the High Court. That S. 115 covers cases in which a subordinate Court has passed orders, acting judicially, in exercise of the powers conferred on it by special Acts has been laid down by the highest authority. In 40 Mad. 793⁴ it was held by their Lordships of the Privy Council that the High Court has jurisdiction under S. 115, Civil P. C., to revise an order of the District Judge made under S. 10, Religious Endowments Act, on the occurrence of a vacancy in a temple Committee declaring that an election by the remaining members of the Committee to fill up the vacancy was regularly held, and that the appointment of the person was valid.

b In A. I. R. 1935 All. 310 = 156 I. C. 1088⁵ an order passed by the District Judge, empowered by the Local Government under the proviso to S. 3, Companies Act, was sought to be revised by the High Court. An objection was raised that there being no provision in the Act authorizing the High Court to revise such an order, the revision petition was incompetent. In overruling this objection Iqbal Ahmad and Harries JJ. held that "the District Judge empowered by the Local Government under the proviso to S. 3, Companies Act, has exclusive original jurisdiction to decide all matters arising under the Companies Act with reference to companies, the registered offices of which are within his district. But the exclusive original jurisdiction conferred on the District Court can in no way oust the revisional jurisdiction that is conferred on the High Court by S. 115, Civil P. C., unless that jurisdiction is either expressly or impliedly ousted by the Companies Act, or the District Court while exercising jurisdiction under that Act, is not subordinate to the High Court within the meaning of S. 115. There is nothing in the Companies Act, either expressly or impliedly ousting the revisional jurisdiction of the High Court. In the absence of such a provision the limits of the revisional jurisdiction of the High Court must be ascertained by reference to S. 115, Civil P. C."

c In A. I. R. 1934 All. 260,⁶ a Full Bench of the Allahabad High Court held that an order passed by a District Judge in the exercise of special jurisdiction conferred on him under the Land Acquisition Act, against which no appeal is provided for in the Act, is open to revision by the High Court under S. 115. Again, in A.I.R. 1938 Lah. 855⁷ it was held that "a Commissioner appointed under the Workmen's Compensation Act and adjudicating a claim made under the Act is a 'Court subordinate to the High Court' within the meaning of S. 115, Civil P. C., or S. 44, Punjab Courts Act, and a petition for revision lies against an order passed by him, provided all the other necessary conditions are present." It must therefore be held that the law was rightly laid down in 12 P. R. 1911⁸ and the contrary view

taken in A.I.R. 1937 Lah. 637² is unsound and that decision must be overruled. It may also be mentioned that in A.I.R. 1940 Lah. 336⁹ Dalip Singh J. sitting in Single Bench has dissented from A. I. R. 1937 Lah. 637² and, more recently, Blacker J. in Civil Revision No. S of 1941, decided on 23rd May 1941, also came to the same conclusion. I would accordingly repel the preliminary objection raised by the respondent's learned counsel and hold that this Court has the power to revise the order of the Senior Subordinate Judge, accepting the Deputy Commissioner's petition under S. 21A, provided appropriate grounds for revision are made out.

The first contention raised by the decree-holder (petitioner) in his revision petition is that S. 21A is limited only to "the correction of decrees, which on the face of the record, infringe the provisions of the Act," and that as in the present case the record of the mortgage suit does not, *ex facie*, show any such infringement the Senior Subordinate Judge should have rejected the Deputy Commissioner's petition under S. 21A on this ground alone. In support of this contention his learned counsel has relied upon a remark by Leslie Jones J. (at p. 152) in 52 P. R. 1916¹ that the intention of the Legislature in framing S. 21A was merely to enable the correction of decrees which, on the face of the record, infringe the provisions of the Act, e. g., if a Court has granted a decree for the possession of land against a Jat Sikh to a person who is described in the plaint as a Danya of Lahore City. With great respect, it must be said, that this remark is too widely expressed, and ought not to be taken literally. Indeed, it seems difficult to understand its real significance, for, in the very next paragraph the learned Judge, after referring to sub-s. (5) of S. 21A, observed that that provision of the law would authorise the civil appellate Court to order a remand if that was thought necessary.

There is nothing in S. 21A or any other provision in the Land Alienation Act, from which the intention imputed to the Legislature in the passage cited could be inferred. On the other hand, sub-s. (2) of that section requires the Court "to find" whether the provisions of the Alienation of Land Act had or had not been contravened by the decree or order in question. It is not stated in the section that this finding must be arrived at only on the materials already on the record of the case in which the impugned decree or order was passed. In most cases the essential facts are not disclosed in that record and it is the duty of the Court hearing the petition under S. 21A, to institute an enquiry in order to come to a correct and definite finding. That such an enquiry is contemplated by the Legislature is clear from sub-s. (5), which says that the provisions of the Civil Procedure Code as regards appeals shall apply, so far as may be, to the procedure of the Court in revision petitions under S. 21A. Frequently, in these petitions the question arises whether the judgment-debtor or the decree-holder is, or is not, a member of a notified agricultural tribe and the Deputy Commissioner and the decree-holder join issue on the point. The record of the original suit throws no light whatever on it and the Court has to hold an enquiry directing the Deputy Commissioner and the opposite party to lead evidence in support of their respective contentions. In other cases, the question involved is whether the property to which the decree or order related is "land" as defined in

4. (17) 4 A.I.R. 1917 P.C. 71: 40 IC 650: 40 Mad. 798: 44 L.A. 261 (P.C.), Balkrishna Udayar v. Vasudeva Ayyar.

5. (35) 22 A.I.R. 1935 All. 310: 156 I.C. 1088: 57 All. 310: 1935 A.L.J. 527, British India Corporation, Ltd. v. Shanti Narain.

6. (34) 21 A.I.R. 1934 All. 260: 148 I.C. 617: 56 All. 556: 1934 A. L. J. 32 (F.B.), Makhan Lal v. Secretary of State.

7. (38) 25 A. I. R. 1938 Lah. 855: 180 I. C. 818, Firm G. D. Gianchand Ferambulators & Tricycle Manufacturers v. Abdul Hamid.

8. (40) 27 A. I. R. 1940 Lah. 336: 190 I. C. 466, Mufti Mohd. Yusuf Ali v. Deputy Commissioner, Hoshiarpur.

the Punjab Alienation of Land Act. Here, again, the record of the original suit is of no assistance and an issue has to be framed and enquiry held in which the revenue papers and other oral and documentary evidence may have to be examined. In practice, the High Court, while hearing petitions presented by the Deputy Commissioner under S. 21A, has on numerous occasions found it necessary to order remands under O. 41, R. 25 for enquiry and report on these and similar questions. For a recent instance of such a case, reference may be made to Civil Revn. No. 653 of 1940,⁹ decided by a Division Bench of this Court on 19th May 1942. In that case a person describing himself as a Dhadi (mirasi) had sold his agricultural land to a non-agriculturist and in a suit brought by the latter a decree for possession of the land had been passed by a Subordinate Judge. The Deputy Commissioner, on being informed that the vendor was really an Awan, which is one of the notified agricultural tribes, in the district, and not a Dhadi, moved the High Court for revision of the decree under S. 21A. Both the vendor and the vendee resisted the Deputy Commissioner's petition on the ground that the vendor was really a Dhadi. It could not be said on the face of the record as to which of these rival contentions was correct. An issue was accordingly framed and the case remanded to the Subordinate Judge for enquiry and report under O. 41, R. 25. The Deputy Commissioner and the vendee led considerable evidence, on which this Court gave its finding.

Reverting to 52 P.R. 1916,¹ it seems necessary to say that the perusal of the judgment shows that apart from the remark quoted above (a remark which, if I may say so with respect, does not appear to have been very happily expressed and which was really obiter) the learned Judges did not purport to lay down any rule of general application. The decision in the case proceeded on its very peculiar facts, and all that the learned Judges really held was that, in the circumstances, they did not think it proper, in proceedings before them, to institute an enquiry into the legitimacy of the respondents, as the identical question was in dispute in another litigation between the respondents and the reversioners of the alleged father, who were the persons primarily interested. The result of that litigation would be final and conclusive as to succession to the property of the deceased and it would have been a waste of time to simultaneously hold an enquiry into the same point at the instance of the Deputy Commissioner. The learned Judges, therefore, declined to exercise their revisional power and dismissed the petition.

The petitioner's learned counsel referred us to two other cases in which 52 P. R. 1916¹ had been followed. In A. I. R. 1927 Lah. 897,¹⁰ Shadi Lal O. J. refused to re-open, at the instance of the Deputy Commissioner, the question which had been raised in a bona fide dispute between the parties and the trial Court, after a consideration of the entire evidence, had found in favour of one party. Similarly, in A. I. R. 1935 Lah. 901,¹¹ the question was whether the property in dispute was "land" as defined in the Alienation of Land Act. This question had been raised in the pleadings, put in issue, and

contested by the parties, and the trial Court, after a careful examination of the evidence, had decided the issue. It was held that this was a finding of fact arrived at in a bona fide dispute between the parties and that the interference of the Deputy Commissioner was improper. After giving this decision the learned Judge casually referred to the observations of Leslie Jones J. in 52 P. R. 1916.¹ It will thus be seen that none of these cases, is really an authority for the broad proposition contended for by the petitioner. As has been stated above, S. 21A requires the Court "to find" whether by the decree or order, which the Deputy Commissioner impugns, the provisions of the Punjab Alienation of Land Act had been infringed and if in order to determine this question it is necessary to go into the facts which are not apparent on the face of the record, it is not only competent to Court of revision, but it is its duty, to frame an issue, institute an enquiry and come to a decision on it. The first contention raised by the petitioner, therefore, fails.

The next question for consideration is whether in disposing of the Deputy Commissioner's petition under S. 21A, the Senior Subordinate Judge has acted illegally and with material irregularity. On going through his judgment, it seems clear that he did not make any enquiry of his own but merely relied on the report submitted by the Naib Tehsildar to the Collector, in the mutation proceedings, and he based his decision on that report. The onus to prove that the properties in dispute were "land" as defined in the Act was, clearly, on the Deputy Commissioner. An issue to this effect should have been framed, the Deputy Commissioner required to lead evidence in support of his contention and the decree-holder then given an opportunity to rebut it. As this procedure was not followed, the decree of the learned Judge cannot be maintained. I would accordingly accept this petition, set aside the order of the Senior Subordinate Judge and remand the case to him with the direction that he should frame an issue as to whether the sale held in execution of the mortgage decree contravenes the provisions of the Punjab Alienation of Land Act, inasmuch as on the date of the sale the properties in question were "land" as defined in the Act. In the circumstances, I would leave the parties to bear their costs so far incurred by them. Counsel have been directed to cause their clients to appear before the Senior Subordinate Judge, Jullundur, on 10th August 1942, when a date for further proceedings will be fixed.

DIN MOHAMMAD J.—I agree.

SALE J.—I agree.

G.N./R.K.

Petition accepted.

* A. I. R. (29) 1942 Lahore 232

DIN MOHAMMAD J.

Emperor

v.

Brij Lal and others — Respondents.

Cri. Revn. No. 718 of 1942, Decided on 22nd June 1942, reported by Sess. Judge, Jhelum, D/- 31-3-1942.

(a) Criminal P. C. (1898), Ss. 367 and 561A.—Not even Magistrate can pass remarks in cases which are sub-judice especially such remarks as tend to cast serious reflection on impartiality of Court trying them — Remark that Honorary Magistrates will "dance to tune played by Municipal Commissioners" held objectionable and would amount to contempt of Court if emanated from any other quarter and should be expunged.

⁹ Civil Revn. No. 653 of 1940, *Fara Mirz v. The Deputy Commissioner, Rawalpindi*.

¹⁰ (27) 14 A.I.R. 1927 Lah. 897 : 105 I. C. 632 : 26 P. L. R. 176, *Bihari Lal v. Muhammad Sher & Co.*

¹¹ (35) 22 A. I. R. 1935 Lah. 901 : 160 I. C. 540, *Deputy Commissioner, Attock v. Atar Chand*.

Nobody, not even a Magistrate, is permitted to pass any remarks in cases which are sub judice, especially such remarks as tend to cast a serious reflection on the integrity and impartiality of the Court trying them. [P 234 C 1]

A remark by a Magistrate in his judgment that the Honorary Magistrates will "dance to the tune played by the Municipal Commissioners" amounts indirectly to criticism of Government who appoint such dishonest Magistrates. If the Magistrate really believes that certain Honorary Magistrates are open to extraneous influences, he should move the authorities concerned for their removal and not condemn them publicly in such an objectionable manner. If such remarks emanate from any other quarter they would amount to contempt of Court. Such remarks therefore being objectionable should be expunged from the judgment. [P 233 C 2; P 234 C 1]

Cr. P. C.—

('41) Chitaley, S. 367, N. 8; S. 561A, N. 7.

('41) Mitra, Page 1214, N. 1047: "Remarks and Comments"; Page 1801, N. 1433A: "Or otherwise to secure the ends of justice"—Expunge remarks'.

(b) Criminal P. C. (1898), Ss. 561A and 367 — Magistrate sitting as Judge cannot base his decision on extra-judicial information—Wholesale condemnation of Municipal Commissioners, leading townsmen, police and members of bar based on hearsay and gossip held highly objectionable and should be expunged.

A Magistrate while sitting as a Judge is not at all expected to base his decision on matters which come to his knowledge extra-judicially. A Magistrate may have more sources of information than one, but in his judgment in judicial cases he can employ only those that are covered by the Indian Evidence Act. The rest is hearsay and cannot be utilised for or against a party in any manner. [P 234 C 1]

[Wholesale condemnation of Municipal Commissioners, leading townsmen, police and members of bar based on hearsay and gossip and imagination held highly objectionable and should be expunged from judgment.] [P 234 C 1]

Cr. P. C.—

('41) Chitaley, S. 367, N. 8; S. 561A, N. 7.

('41) Mitra, Page 1214, N. 1047: "Remarks and Comments"; Page 1801, N. 1433A: "Or otherwise to secure the ends of justice"—Expunge remarks'.

(c) Criminal P. C. (1898), Ss. 561A and 367 — It is not within province of European Magistrate to preach Indians on such delicate subject as their womenfolk or to make sweeping generalisations about Indians — Remarks about sensitiveness of Indians at their womenfolk being looked at by any one so much as twice and about Indians not yet having developed sense of general and civic responsibility, their being devoid of integrity and their having no claim to be called civilized people held highly offensive, insulting, most ill-advised and indiscreet and should be expunged from judgment.

It is not within the province of a European Magistrate to assume in his judgments the role of a mentor and to preach to all Indians without any exception on such delicate subject as their womenfolk and to ask them to give up their time-honoured notions or to make sweeping generalisations about Indians. [P 234 C 1]

[Remarks about Indians being remarkably sensitive if one so much as looks twice at their womenfolk and that they should learn more *esprit de*

corps in this connection held not in good taste, highly objectionable and insulting and remarks about Indians not yet having developed sense of general and civic responsibility, their being devoid of integrity and their having no claim to be called civilized people held most offensive, ill-advised and indiscreet and not borne out by actual facts. All remarks held should be expunged from the judgment.] [P 233 C 2; P 234 C 1]

Cr. P. C.—

('41) Chitaley, S. 367, N. 8; S. 561A, N. 7.

('41) Mitra, Page 1214, N. 1047: "Remarks and Comments"; Page 1801, N. 1433A: "Or otherwise to secure the ends of justice"—Expunge remarks'.

Arjan Dass—for Respondents.

ORDER. — A case against one Brij Lal and his two brothers under S. 107, Criminal P. C. was tried by Mr. K. D. Rogers, Sub-Divisional Magistrate, Pind Dadan Khan, and finding that there was no justification for taking any action against them, he made an order of discharge. On revision by the complainant, the Sessions Judge, while maintaining this decision on the merits, took exception to certain passages in the Magistrate's judgment and consequently forwarded the proceedings to this Court with a recommendation that the offending passages be ordered to be expunged. They read as follows:—

1. "Admittedly Indians are remarkably sensitive if one so much as looks twice at their womenfolk, but they should learn more *esprit de corps* in this connection."

2. "In respect of injuries which Chanan Shah and Jawala Sahai may have sustained, ordinary criminal cases have been filed against Brij Lal before the Bench, and as I have no doubt that the Honorary Magistrates would be more inclined to dance to the tune played by the Municipal Commissioners, and award suitable sentences I fail to see what business it is of mine to bind Brij Lal in respect of those offences."

3. I have heard from quite respectable people that Brij Lal has remained in the lock-up for such a long period, not primarily because the interim security asked was too high, but because those who would come forward to me to pledge the necessary security, were prevented from so doing either by the police or by members of the Municipal Committee and leading townsmen who seem to have been against the accused *en masse* or perhaps by combination of both.

4. Of course, I cannot compel any member of the Bar to appear in any case but I think it is surprising that the lawyers who will fight many a forlorn case on behalf of a murderer whom they know to be guilty, would not accept a brief in a singularly problematical case like the present."

The reasons advanced by the Sessions Judge are that passage 1 is a sweeping generalisation which was uncalled for and was likely to give offence to a large number of people in this country; passage 2 was even more inappropriate and rather amounted to a contempt of Court; and the remarks made in passages 3 and 4 were not warranted by the record. On going through the record and the judgment of the Magistrate, I have come to the conclusion that the recommendation of the Sessions Judge must be accepted. The remarks made by the Magistrate in passage 1 are obviously not in good taste. Further, it was highly improper for him to assume the role of a mentor and to preach to all Indians without any exception on such a delicate subject. He should have

known that the ideas imbibed by him in his own country were altogether foreign to this soil and that his advice that the Indians should "learn more *esprit de corps*" so as not to resent the conduct of those people who stare at their womenfolk with an immoral object, would be treated as a sheer insult. Indians treat their womenfolk—mothers, daughters, wives and sisters—as sacred objects and cannot be blamed therefore if they do not brook their profanation in any manner; and it is not within the province of the Courts of law to teach them to give up their time-honoured notions, which have been ingrained in their blood for centuries past.

Similarly, his reference to the Honorary Magistrates in passage 2 betrays his complete ignorance not only of law but of judicial decorum as well. He should have known that nobody—not even the Sub-Divisional Magistrate—is permitted to pass any remarks in cases which are sub judice, especially such remarks as tend to cast a serious reflection on the integrity and impartiality of the Court trying them. Honorary Magistrates are not elected by the people but are appointed by Government and for a responsible officer to say that they will "dance to the tune played by the Municipal Commissioners", is indirectly to criticise those who appoint such dishonest Magistrates. If the Sub-Divisional Magistrate really believed that the Honorary Magistrates were open to extraneous influences, he should have moved the authorities concerned for their removal and not condemned them publicly in such an objectionable manner. Had these remarks emanated from any other quarter, they would clearly have amounted to a contempt of Court as pointed out by the Sessions Judge and I would have *suo motu* taken action in the matter in order to protect the dignity of the Subordinate Courts. Inexperience of the Magistrate is perhaps the only excuse that can be advanced in the present case for such imprudent observations.

Coming now to passage 3, the Magistrate should have realised that while sitting as a Judge he is not at all expected to base his decision on matters which come to his knowledge extra-judicially. A Sub-divisional Magistrate may have more sources of information than one, but in his judgment in judicial cases he can employ only those that are covered by the Evidence Act. The rest is hearsay and cannot be utilised for or against a party in any manner. With a little consideration, it would have been clear to the Magistrate that a statement made to him in the absence of the parties and not subjected to the test of cross-examination cannot be depended upon for the simple reason that its truth cannot be guaranteed. Further, in his wholesale condemnation of all Municipal Commissioners and leading townsmen, he did not even spare the police which again, like the Bench of Honorary Magistrates, was entitled to his protection and could not be censured without adequate proof and without being given an opportunity of refuting the allegations made against them. Passage 4 is equally objectionable, based as it is on mere gossip or the Magistrate's own imagination. I accordingly order that the passages reproduced above should be expunged from the Magistrate's judgment. Before I conclude, I am constrained to remark that there is another passage in this judgment which, though not included in the recommendation of the Sessions Judge, is in my view the most offensive of all. It runs as follows:

"I have gone into this case in considerable detail, as it reveals many features which must be obliterated if Indians are to develop that sense of general and civic responsibility and integrity which alone can

entitle them to the right to be called a civilised people."

This evidently implies that in the opinion of this Magistrate (1) Indians have not yet developed a sense of general and civic responsibility, (2) they are devoid of integrity, and (3) they cannot in fairness claim to be called a civilised people. Those remarks to say the least, are most ill-advised and most indiscreet. Even if he seriously entertained this view, expediency alone should have taught him not to give expression to it in a judicial pronouncement as it was likely to wound the feelings of millions of people who constitute one-fifth of the human race, more especially at a time when Provincial Governments are being efficiently run by Indian Ministers; other high offices of state are being equally efficiently occupied by Indians; there is already on the tapis a proposal to Indianise the Central Government, and when these very persons, whom he does not consider entitled to be called a civilised people so far, are shedding their precious blood to maintain the integrity and solidarity of the British Empire and to keep the British flag flying in every nook and corner of the world. It is hardly necessary to observe that the standard of civilisation is not the same every where in this far-flung world, that Indians were known to be a civilised people long before the other denizens of the world earned this epithet, that their integrity is as unsailable as their loyalty and devotion to the crown and that they do not lag behind any human being in the world in their sense of general and civic responsibility. Black sheep there are not only among Indians but in every community in the world and it is evident that a community cannot be judged by its black sheep alone. This passage, therefore, will also be expunged along with the others.

I would further advise this Magistrate that as he is still on the threshold of his career and may be looking forward to a brilliant future, he should never indulge in such diatribes in his judgments and never yield to the temptation of making sweeping generalisations therein, however, strong such temptation may be. In the end, I direct that a copy of this order be forwarded to the Home Secretary for the information of the Provincial Government.

G.N./R.K.

Order accordingly.

* A. I. R. (29) 1942 Lahore 234

TEK CHAND AND BECKETT JJ.

Sohan Lal and another—Defendants—
Appellants

v.

Sardar Labh Singh, Plaintiff and
others, Defendants—Respondents.

Second Appeal No. 1477 of 1940, Decided on 19th May 1942, referred by Tek Chand J., D/- 15th October 1941.

* Civil P. C. (1908), O. 21, R. 46 and S. 60—Unpaid mortgage money is not "debt"—Hence it cannot be attached in execution of decree against mortgagor or his heirs.

A mortgage whether it is simple or possessory or by way of conditional sale holds good to the extent of the amount paid : (16) 3 A. I. R. 1916 Lah. 155 (F.B.), *Rel. on*. [P 286 O 2]

The mortgagee cannot be compelled to lend more. If possession has passed, the mortgagor may sue to get it back after a time or take steps to relieve him.

a self of some of the other conditions of the mortgage. If he has suffered any loss he may sue for damages. But the mortgagor has no actionable claim for the recovery of the unpaid mortgage money against the mortgagee. [P 236 C 2]

Hence the unpaid balance of the mortgage money is not a debt and, therefore, is not liable to attachment in execution of a money decree against the mortgagor or his heirs : ('36) 23 A. I. R. 1936 Lah. 727, *Rel. on* ; ('25) 12 A. I. R. 1925 Lah. 174; ('33) 20 A.I.R. 1933 Lah. 1; ('35) 22 A.I.R. 1935 Lah. 26 and ('36) 23 A. I. R. 1936 Lah. 196, *Not approved*; ('31) 18 A.I.R. 1931 All. 95, *Dissent.*; ('16) 3 A.I.R. 1916 Cal. 580 and ('34) 21 A. I. R. 1934 All. 954, *Approved*. [P 236 C 2]

T. P. Act —

(36) Mulla, Page 327, N. "Mortgage" ; Page 331

Pts. (r) to (v); Page 334 Pt. (g).

(34) Mitra, Pages 301-302, N. 330.

C. P. C. —

(40) Chitaley, S. 60, N. 7 Pt. 6; O. 21 R. 46, N. 2 Pt. 1.

(41) Mulla, Page 242, N. "Debts," Illus. 5; Page 311 Pts. (k) and (l).

M. L. Puri — for Appellants.

Jhanda Singh — for Respondents.

TEK CHAND J. — By a registered deed executed on 2nd March 1937, Sawan Singh mortgaged his land with possession to Labh Singh for Rs. 5000. A part of the consideration was paid in cash, another part was left with the mortgagee for payment to prior creditors of the mortgagor and Rs. 1350 were agreed to be paid before the Tahsildar at the time when mutation of the mortgage was effected. Some-
 c time after the mortgage, the mortgagor Sawan Singh died childless and his estate devolved upon his nephew Indar Singh and Mula Singh. Sohan Lal appellant had a money decree against Indar Singh and Mula Singh. In execution of that decree, he attached Rs. 1350, which the mortgagee Labh Singh had agreed to pay to Sawan Singh at the time of mutation of the mortgage but which it was alleged had not been paid. Labh Singh and Indar Singh objected to the attachment on two grounds: (1) that Rs. 1350 had actually been paid to Indar Singh and Mula Singh, and (2) that in any case, the sum of Rs. 1350 was not a "debt" due by the mortgagee to the mortgagor or his heirs which could be attached in execution of a money decree obtained by a third party against them. The executing Court overruled these objections. Thereafter, Labh Singh instituted
 a the present suit for a declaration that the amount had been paid to Mula Singh and Indar Singh, and (2) that in any case it was not a "debt" and, therefore, not liable to attachment under S. 60 or O. 21, R. 46, Civil P.C. The trial Court dismissed the suit.

On appeal by the plaintiff, the learned District Judge held that Labh Singh had failed to prove the alleged payment by him to Indar Singh and Mula Singh but he held that Rs. 1350, the unpaid balance of the consideration for the mortgage, was not a "debt" and was not liable to attachment in execution of a money decree against the heirs of the mortgagor. He accordingly, granted the plaintiff Labh Singh a declaration to this effect. On second appeal by the attaching creditor Sohan Lal, it has been strenuously contended that the mortgage in the present case being one with possession for a fixed term of years the mortgagor could maintain a suit for the recovery of the unpaid portion of the mortgage money and, therefore, this was an actionable claim and as such a "debt" and liable to attachment under

S. 60 and O. 21, R. 48, Civil P.C. In support of this contention reliance has been placed upon 52 All. 761¹ at p. 765, A.I.R. 1925 Lah. 174,² A.I.R. 1933 Lah. 1,³ A. I. R. 1935 Lah. 26⁴ and A. I. R. 1936 Lah. 196.⁵

In 52 All. 761,¹ it was laid down by Sulaiman and Kendall JJ. that a suit by the mortgagor to recover from the usufructuary mortgagee the money for which the mortgage was made and possession delivered is not really one for the specific performance of a mere contract to lend money, but is one to compel the defendant to perform his part of the contract when he has obtained delivery of possession of the property. In coming to this conclusion the learned Judges laid emphasis on the fact that a mortgage is a conveyance and not a mere contract for a loan. In a subsequent case decided in the same Court reported in A. I. R. 1934 All. 954 = 154 I.C. 709⁶ Kendall J., however, observed that the above dictum was, in the circumstances of the case, merely obiter and that where a part of the mortgage money remains unpaid, the suit to recover it is really one to enforce an agreement to lend money and the proper remedy will be to sue for damages, the award of which will be at the discretion of the Court. The learned Judges further held that money left with the mortgagee is not a 'debt' as contemplated in the garnishee rules and hence could not be attached. In coming to this conclusion he relied upon two earlier Division Bench decisions of the same Court in 30 All. 252,⁷ and also A.I.R. 1934 All. 449 = 154 I.C. 542,⁸ which was a case of a possessory mortgage and in which a part of the amount secured had been left with the mortgagee for payment to a third party. It was held that the unpaid portion of the mortgage loan did not constitute a 'debt' due by the mortgagee to the mortgagor and that as such could not be attached under the provisions of the Civil Procedure Code.

In A.I.R. 1925 Lah. 174,² Martineau J. held that in a mortgage there was an implied contract by the mortgagee to pay the whole of the amount for which the property had been mortgaged and a suit was maintainable by the mortgagor to recover the unpaid balance of the mortgage money from the mortgagee. The case was heard *ex parte* and the judgment is very brief and it does not appear whether the mortgage was simple or possessory. The question is not discussed at any length and no reasons are given in support of the conclusion reached. In A. I. R. 1933 Lah. 1,³ Jai Lal J. drew a distinction between simple and possessory mortgages. He held that the general rule that no suit to specifically enforce a contract to lend money is maintainable does not apply to the right of a mortgagor in a possessory mortgage to recover the balance of the mortgage

1. ('31) 18 A. I. R. 1931 All. 95 : 124 I. C. 764 : 52 All. 761 : 1930 A. L. J. 1141, Sheopati Singh v. Jagdeo Singh.

2. ('25) 12 A. I. R. 1925 Lah. 174 : 78 I. C. 445, Imam Din v. Dittu.

3. ('33) 20 A. I. R. 1933 Lah. 1 : 140 I. C. 495 : 83 P. L. R. 1085, Thakar Singh v. Jagat Singh.

4. ('35) 22 A.I.R. 1935 Lah. 28 : 159 I.C. 763, Jai Gopal v. Sundar Singh.

5. ('36) 23 A. I. R. 1936 Lah. 196 : 162 I. C. 698, Sardar Khan v. Ram Mal.

6. ('34) 21 A. I. R. 1934 All. 954 : 154 I. C. 709 : 1934 A.L.J. 993, Bhalron v. Lalita Misir.

7. ('08) 30 All. 252 : 1908 A. W. N. 105 : 5 A. L. J. 491, Phul Chand v. Chand Mal.

8. ('34) 21 A. I. R. 1934 All. 449 : 154 I. C. 542 : 1934 A. L. J. 713, Khunai Lal v. Bankey Lal.

amount left with the mortgagee and particularly when possession has been given to the mortgagee. He observed that in such cases no question of specific performance of the contract arises and, further held that the giving of possession by the mortgagor to the mortgagee was not a condition precedent to enable the former to institute a suit for the recovery of the mortgage money. In coming to this conclusion the learned Judge relied largely upon 52 All. 761.¹ In A. I. R. 1935 Lah. 26,⁴ Abdul Rashid J. held that money reserved with the mortgagee for payment to prior creditors of the mortgagor was a 'debt' due by the mortgagee to the mortgagor and that the mortgagor can maintain a suit to recover it. In support of his conclusion, the learned Judge followed the decisions of Martineau J. in A. I. R. 1925 Lah. 174² and Jai Lal J. in A. I. R. 1933 Lah. 1³ cited above. In A. I. R. 1936 Lah. 196,⁵ it was held by Bhide and Currie JJ. that when the mortgagor had completed his part of the contract by executing a usufructuary mortgage and put the mortgagee in possession, the assignee of the mortgage could sue the mortgagee for recovery of the unpaid mortgage money, it being not a mere right to sue but an actionable claim. Here again reliance was placed principally on 52 All. 761.¹

A contrary view, however, has been taken by Addison and Din Mohammad JJ. in 17 Lah. 270⁹ which also, was the case of a possessory mortgage. The mortgagee had been put in possession and it had been agreed that interest would be set off against the right to receive the income. A part of the money had been left with the mortgagee to pay off a prior creditor of the mortgagor. A third party having obtained a decree against the mortgagor attached the balance left with the mortgagee. It was held that it was not a 'debt' due by the mortgagee to the mortgagor and could not be attached. A. I. R. 1925 Lah. 174,² A. I. R. 1933 Lah. 1³ and A. I. R. 1935 Lah. 26⁴ were not followed. Reference was made to 41 Mad. 959;¹⁰ 47 Mad. 698;¹¹ 34 M. L. J. 342¹² and 43 Cal. 59¹³ in which it had been held that a suit to specifically enforce a contract to lend money whether on security or not was not maintainable. In the last of these cases, 43 Cal. 59,¹³ the mortgage was by conditional sale and a part of the mortgage had been paid. The mortgagor had instituted a suit against the mortgagee for recovery of the balance but the suit was held not to be maintainable as being one in substance for specific performance of the contract to lend. One of the cases referred to was (1873) L. R. 5 P. C. 346¹⁴ decided by their Lordships of the Privy Council, which arose out of an action for recovery of unpaid part of the consideration for a mortgage by conditional sale. The action was dismissed, it being held that the case fell within the principle that no one

can be compelled to borrow or lend money and that the only remedy of the aggrieved party is to sue for damages.

An important case is (1898) A. C. 309,¹⁵ decided in the House of Lords. There a certain person had entered into an agreement to purchase debentures and make payments in instalments. Some of the instalments had been paid but the purchaser declined to pay the rest. In an action to recover the balance the Lord Chancellor Lord Halsbury observed that in such cases the applicant for debentures on the face of the instrument contracted to pay something but the real nature of the whole transaction was an agreement by the applicant to lend money at certain interest, and the action in this case was in truth mainly, if not altogether, directed to compel the intending lender to perform his contract to lend, which undoubtedly he had refused and neglected to do and that it had been held in a long and continuous course of decisions that such an action was not maintainable. Lord Herschell observed that the sums of money constituting the instalments which the defendant had agreed to pay did not constitute a "debt." In this opinion the other Law Lords, Lord Watson, Lord Macnaghten and Lord Morris agreed.

In several of the Indian cases cited for the appellant, if I may say so with great respect, this aspect of the matter has not been kept in view. There seems to be no difference in substance between cases in which the mortgage is simple and those where it is possessory or by way of conditional sale. In all such cases the mortgage holds good to the extent of the amount paid, as laid down by the Full Bench of the Chief Court in 53 P. R. 1916,¹⁶ and the mortgagee cannot be compelled to lend more. If possession has passed the mortgagor might sue to get it back after a time or take steps to relieve himself of some of the other conditions of the mortgage. If he has suffered any loss he may sue for damages. But it seems clear that the unpaid part of the mortgage money is not a "debt" nor has the mortgagor an actionable claim for its recovery against the mortgagee. Most of the cases in which the contrary has been held were based on 52 All. 761,¹ but one of the learned Judges who was a party to that case resiled from the view expressed in it and it has lost much of its value as a correct exposition of the law. Two other Benches of the Allahabad Court had, before and after this decision, taken the opposite view. After giving the matter careful consideration I am of opinion that the sum of Rs. 1350, which the mortgagee had agreed to pay to the mortgagor at the time of the mutation but which he had failed to pay, is not a "debt" due by the mortgagee to the mortgagor and, therefore, could not be attached in execution of the decree obtained by the appellants against the heirs of the mortgagor. I would accordingly dismiss this appeal but, in the circumstances, would leave the parties to bear their own costs throughout.

BECKETT J.—I agree.

G.N./R.K.

Appeal dismissed.

15. (1898) 1898 A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 46 W. R. 545; 14 T. L. R. 298, South African Territories v. Wellington.

16. (1916) 3 A.I.R. 1916 Lah. 155; 33 I. C. 474; 53 P. R. 1916 (F.B.), Allah Ditta v. Nazir Din.

9. (36) 23 A.I.R. 1936 Lah. 727; 164 I. C. 582; 17 Lah. 270; 38 P. L. R. 574, Sewa Singh v. Milkha Singh.

10. (19) 6 A. I. R. 1919 Mad. 322; 49 I. C. 291; 41 Mad. 959; 35 M. L. J. 489, Minakshi Sundara Mudaliar v. Rathna Sami Pillai.

11. (25) 12 A.I.R. 1925 Mad. 62; 80 I. C. 5; 47 Mad. 698; 47 M. L. J. 435, Yadavendra Bhatta v. Srinivasa.

12. (18) 5 A. I. R. 1918 Mad. 364; 45 I. C. 161; 34 M. L. J. 342, Rajagopal Aiyar v. Sheikh Davood Bawther.

13. (16) 3 A.I.R. 1916 Cal. 580; 29 I. C. 621; 43 Cal. 59; 21 C. L. J. 532; 19 C. W. N. 1832, Sheikh Galina v. Sadarjan Bibi.

14. (1873) L. R. 5 P. C. 346, Lomas v. Gurety.

a * A. I. R. (29) 1942 Lahore 237

TEK CHAND AND BECKETT JJ.

Abdul Ghani — Appellant

v.

Anjuman-i-Imdad Qarza Bahami Chah:

No. 127 R. B. — Respondent.

Letters Patent Appeal No. 27 of 1940, Decided on 5th March 1942, from order of Dalip Singh J., Reported in ('40) 37 A. I. R. 1940 Lah. 280.

(a) Provincial Insolvency Act (1920), Ss. 34 (2), 33, 44 (2)—Liability of member of Co-operative Society to contribute to assets of society in event of its being dissolved before or during member's insolvency is debt provable in insolvency — Liquidator neither proving debt nor having it excluded from schedule under S. 33 — Insolvent granted complete discharge under S. 44 (2) — Liquidator has no jurisdiction to assess contribution of insolvent as member of society under S. 42 (2) (b), Co-operative Societies Act : 42 P. L. R. 126—('40) 27 A. I. R. 1940 Lah. 280=189 I. C. 370, REVERSED.

The liability of a member of a Co-operative Society to contribute to the assets of the Society in the event of its being dissolved before or during insolvency of the member is a debt provable in insolvency and therefore the liquidator should either prove it or have it excluded from the schedule under S. 33 if it came within the provisions of that section. Where he does not do so, the member's liability for such debt ceases on his being granted a complete discharge by the Insolvency Court as expressly provided in S. 44 (2). The liquidator, therefore, has no jurisdiction to assess the contribution of the insolvent as a member of the Society under S. 42 (2), Co-operative Societies Act, after his complete discharge. The fact that the liability of the member did not materialise till some time after the adjudication is immaterial : ('40) 27 A. I. R. 1940 Lah. 304, Rel. on; 42 P. L. R. 126—('40) 27 A. I. R. 1940 Lah. 280=189 I. C. 370, REVERSED.

[P 238 C 1, 2]

* (b) Civil P. C. (1908), S. 47 — Executing Court cannot go behind decree—But it can enquire whether court which passed decree had inherent jurisdiction and can refuse to execute decree if it was without jurisdiction — Liquidator's order under S. 42 (2) (b), Co-operative Societies Act, stands on no higher footing—Executing Court can refuse to execute it if it was without jurisdiction : 42 P. L. R. 126—('40) 27 A. I. R. 1940 Lah. 280=189 I. C. 370, REVERSED.

The general rule is that an executing Court cannot go behind the decrees. It must take the decrees as it is and must proceed to execute it. It might have been correctly passed, or it might be erroneous or not according to law, but it is none-the-less binding on, and conclusive as between the parties unless set aside on appeal, revision or other appropriate proceedings. The function of the executing Court is to enforce and execute it and not to question its correctness. To this general rule, however, there is a well-established exception that if there was a lack of inherent jurisdiction in the Court which had passed the decrees the executing Court must refuse to execute it as being a nullity. Therefore the executing Court can enquire whether the Court which passed the decrees had, or had not, inherent jurisdiction to pass it : ('33) 20 A. I. R. 1933 P. C. 61, Rel. on. [P 238 C 2; P 239 C 1]

An order by the liquidator under S. 42 (2) (b)

Co-operative Societies Act, stands on no higher footing and the civil Court executing it is, therefore, competent to enquire if the order had been passed within the limits of his jurisdiction and to refuse to execute it if it was without jurisdiction : 42 P. L. R. 126—('40) 27 A. I. R. 1940 Lah. 280=189 I. C. 370, REVERSED. [P 239 C 1]

C. P. C. —

('40) Chitaley, S. 38, N. 8 Pts. 1 to 5, Pt. 19.

('41) Mulla, Page 164 Pt. (v).

(c) Co-operative Societies Act (1912), S. 42 (2) — Essentials of liquidator's jurisdiction under S. 42 (2) stated — Order passed by him when may be said to be without jurisdiction — Order under S. 42 (2) (b) passed without notice to member is without jurisdiction.

The essentials of the liquidator's jurisdiction under S. 42 (2) are that the person concerned must be a member or a past member of the society and that he is jointly liable with other members to contribute to the assets of the society to meet the losses which it has incurred. If these, or any of these, conditions are satisfied the liquidator has authority to determine the amount and his decision cannot be questioned in any Court. But if, for instance, he makes an assessment on a person who is not a member, or had ceased to be a member for over two years before the dissolution of the society, or whose liability to contribute had otherwise been extinguished by operation of law, he has clearly acted in excess of his jurisdiction and his order is a nullity and, therefore, incapable of execution : *Case law Rel. on*; ('41) 28 A. I. R. 1941 Lah. 284, *Disting.*

[P 239 C 1]

An order under S. 42 (2) (b) without notice to the party against whom it is made is also without jurisdiction and a nullity : ('42) 29 A. I. R. 1942 Lah. 129; ('35) 22 A. I. R. 1935 Rang. 376 (F. B.); ('20) 7 A. I. R. 1920 Cal. 386 and ('40) 27 A. I. R. 1940 Cal. 198, *Rel. on*. [P 240 C 1]

(d) Co-operative Societies Act (1912), S. 42 (2) (b) — Word "contribution" in S. 42 (2) (b) — Meaning.

The word "contribution" in S. 42 (2) (b) presupposes an existing liability. [P 239 C 1]

Mohammad Iqbal Husain — for Appellant.

J. N. Malhotra — for Respondent.

TEK CHAND J. — Abdul Ghani appellant was a member of a Co-operative Society, Anjuman-i-Imdad-Qarza Bahami, Chah No. 127 R. B. District Lyallpur. In October 1930 he applied for being adjudicated an insolvent and on 4th August 1931 the Insolvency Judge, Lyallpur, passed the order of adjudication. Four years later, on 12th December 1935, an order was passed granting him an absolute discharge. In the meantime, on 8th November 1932, the registration of the society was cancelled by the Registrar under S. 39, Co-operative Societies Act, and a liquidator appointed under S. 42 (1) to wind up its affairs. The winding up continued for several years, in the course of which the liquidator, on 27th January 1937, more than a year after the discharge and without notice to the appellant, passed an order under S. 42 (2) (b) determining Rs. 1182 as the contribution of the appellant as a member of the society to the assets of the society. An application was then made in the Court of the Sub-Judge First Class, Lyallpur, for execution of the order of the liquidator under S. 42 (5) (a). Before him the appellant raised the objection that the order of the liquidator was ultra vires and therefore, could not be executed as a decree of a civil Court, inasmuch as the liability of the appellant as a member of the society was a debt provable in insolvency and as the

a liquidator had not proved it, the appellant, on his discharge in 1935, was released from such liability for the future, and the liquidator, in 1937, had no jurisdiction to determine his contribution to the assets of the society.

The executing Court sustained the objection and dismissed the application for execution. This decision was upheld on appeal by the Additional District Judge. On second appeal to this Court the learned Judge in Single Bench agreed with the view of the lower Courts that the liquidator could have taken action under S. 33, Provincial Insolvency Act, and either proved the debt or had it excluded (if it came within the provisions of that section) from the schedule of debts and as he had not done so he was clearly wrong in proceeding to assess the appellant's liability as a member of the Society after he had been discharged by the insolvency Court in view of the provisions of S. 44 (2) which clearly contemplate the discharge of the insolvent from all provable debts whatsoever. The learned Judge, however, held that as the liquidator had jurisdiction to assess the appellant's liability and make an order to that effect, the executing Court could not refuse to execute it even though the order was erroneous. On this finding, the learned Judge accepted the appeal and reversed the order of the Courts below. As, however, the question was of first impression and the point involved a difficult one, he granted a certificate for an appeal under the Letters Patent.

At the commencement of the hearing before us, counsel for the respondent contended that the liability of the appellant as a member of the society to contribution was not a "provable debt" under the Provincial Insolvency Act and the finding of the learned Judge in Single Bench was erroneous. After hearing him at length we see no force in this contention. It is laid down in sub-s. (2) of S. 34 that debts provable under the Act include all debts and liabilities, present or future, certain or contingent, or to which the debtor is subject before his discharge by reason of any obligation incurred until the date of such adjudication. The appellant was a member of the society and it is common ground that as such he was liable to be called upon to contribute to the assets of the society in the event of its being dissolved. This contingent liability was incurred by the appellant before his adjudication. It was therefore a "provable debt" as defined in the Act. It is true that the liability did not materialise till some time after the adjudication but this circumstance is, in my opinion, immaterial. A case very similar to the present is A. I. R. 1940 Lah. 304¹ decided by the learned Chief Justice and Din Mohammad J. There a shareholder in a joint stock company which had gone into liquidation, was adjudicated insolvent and was later discharged. There were some calls for share-money outstanding against him, but the liquidator did not prove them in insolvency and the question arose whether his liability subsisted after discharge. It was held "that the possibility of a call being made by the company, when it was in existence, upon the uncalled balance of the share-money due upon the shares was a contingent liability and as such a debt provable in insolvency, and, therefore, the liability therefor disappeared when the order of discharge was made." The liability of a member of a Co-operative Society to contribute to the assets of the Society in the event of its being

dissolved before or during insolvency is on the same footing. It is a "provable debt" and as such the liquidator should have either proved it or had it excluded from the schedule under S. 33 if it came within the provisions of that section, and as he did not do so the appellant's liability for such debt ceased on his being granted a complete discharge by the Insolvency Court as expressly provided in S. 44 (2), Insolvency Act. The liquidator, therefore, was clearly wrong in proceeding to assess the contribution of the appellant as a member of the Society under S. 42 (2) (b), Co-operative Societies Act.

In sub-s. (5) of S. 42, Co-operative Societies Act, it is laid down that an order made by the liquidator under that section shall be enforced by a civil Court having local jurisdiction as if it were a decree passed by such Court. Sub-section (6) of S. 42 further provides that save as otherwise expressly provided, no civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act. The question for decision, therefore, is whether the civil Court could decline to execute the order of the liquidator passed in the circumstances mentioned above. The answer must depend on whether the liquidator in making the order exceeded the limits of his jurisdiction and, therefore, the order was a nullity, or whether it was an irregular or erroneous order passed in the exercise of his jurisdiction. If the former, the executing Court could, indeed it must, refuse to execute it. But if it was the latter the Court could not question its correctness and must enforce it.

It has already been stated that under sub-s. (5) of S. 42, the order of a liquidator under sub-s. (2) (b) is to be executed in the civil Court as if it were a decree passed by that Court itself. The powers of the Court in such a case are, therefore, the same as those when it is executing a decree passed by itself. It is common ground that the general rule is that an executing Court cannot go behind the decree. It must take the decree as it is and must proceed to execute it. It might have been correctly passed, or it might be erroneous or not according to law, but it is none-the-less binding on, and conclusive as between the parties unless set aside on appeal, revision or other appropriate proceedings. The function of the executing Court is to enforce and execute it and not to question its correctness. To this general rule, however, there is a well-established exception that if there was a lack of inherent jurisdiction in the Court which had passed the decree and for some other reasons, the decree is a nullity, the executing Court must refuse to execute it. This matter is now concluded by the highest authority, the latest pronouncement being that of their Lordships of the Privy Council in 60 Cal. 670,² affirming the decision of the Calcutta High Court in 58 Cal. 1018.³ In that case an award had been made under the Arbitration Act, 1899, and proceedings were taken for filing it in the Court. The Court after noting that the award had been filed proceeded to pass a decree in accordance with its terms, as if the proceedings before it were under Sch. 2, Civil P. O. When execution of this decree was taken, the mistake was pointed out and it was held that the executing Court was entitled to

2. (1938) 20 A.I.R. 1938 P. C. 61 : 142 I.C. 324 : 60 Cal. 670 : 60 I. A. 71 (P.C.), Jnanendramohan v. Rabeendranath.

3. (1932) 19 A. I. R. 1932 Cal. 9 : 136 I. C. 466 : 58 Cal. 1018 : 55 C.W.N. 537, Babindranath Chakrabarti v. Jnanendramohan.

1. (1940) 37 A. I. R. 1940 Lah. 304 : 190 I. C. 211 : A.I.R. (1940) Lah. 453 : 42 P. L. R. 754, In re Muslim Bank of India Ltd., Lahore.

refuse to execute it on the ground that it was made without jurisdiction. It was laid down by the High Court that where a decree is passed in excess of the limits prescribed "it may be regarded as void on the ground of lack of inherent jurisdiction." In upholding this decision their Lordships of the Judicial Committee observed: "the Arbitration Act did not contain any provision for making a decree on an award such as is contained in Sch. 2, para. 21, Civil P.C. Such a decree if made is one without jurisdiction and therefore a nullity. Their Lordships agree with the view taken by the Courts in India that the decree was passed without jurisdiction and therefore the executing Court was justified in declining to execute it." This ruling has set at rest an old standing controversy in the Courts in India and it may be taken as settled law that the executing Court can inquire whether the Court which passed the decree had, or had not, inherent jurisdiction to pass it.

An order by the liquidator under the Co-operative Societies Act is on no higher footing and the civil Court executing it is therefore competent to inquire if the order had been passed within the limits of his jurisdiction. Under S. 42 (2) of the Act when the registration of a society has been cancelled and a liquidator appointed he is empowered to determine the contribution payable by a member or a past member of the society to its assets in order to cover the loss which the society has suffered. "Contribution" pre-supposes an existing liability. It is defined in Murray's Oxford Dictionary "as payment by each of the parties interested of his share in any common loss or liability." The essentials of the liquidator's jurisdiction in this matter therefore are: (1) that the person concerned must be a member, or a past member, of the society, and (2) that he is jointly liable with other members to contribute to the assets of the society, to meet the losses which it has incurred. If these, or any of these, conditions are satisfied, the liquidator has authority to determine the amount and his decision cannot be questioned in any Court. But if, for instance, he makes an assessment on a person who is not a member, or had ceased to be a member for over two years before the dissolution of the society, or whose liability to contribute had otherwise been extinguished by operation of law, he has clearly acted in excess of his jurisdiction and his order is a nullity and therefore incapable of execution.

There are several cases in which orders of the liquidator, passed in the absence of one or other of these essential conditions have been held to be nullities. In A.I.R. 1937 Lah. 63⁴ an award under the Co-operative Societies Act had been made against a certain person and proceedings had been taken for enforcing it in a civil Court. In those proceedings it transpired that the person concerned had died long before the order was made. It was held that the award was a nullity and the Court must decline to execute it. In A. I. R. 1937 Lah. 981,⁵ the liquidator had passed an order against a member of the society declaring him liable to pay a certain sum of money to the society as due on a "loan" raised by him and proceedings had been taken in the civil Court to enforce this order. The member contested

the order and brought a suit for declaration that the order of the liquidator had been passed without jurisdiction, inasmuch as under S. 42 (2) (b) his powers were limited to determine the amount of "contribution" payable by member to the assets of the society in order to meet the losses sustained by the society and not to determine the liability of the person in relation to a "loan" alleged to be owed by him to the society. The liquidator in reply had pleaded that the civil Court was debarred from questioning the order passed by him. It was held, repelling the objection, that the liquidator had exceeded his jurisdiction in determining the liability of the member for the alleged loan and the suit was decreed.

In 14 Lah. 703⁶ the liquidator had passed an order under S. 42 against a person who denied that he was a member of the society. In a civil suit brought by him it was found that he was not a member. It was accordingly held that the liquidator's order was ultra vires and could not be executed against him. This decision was followed by the Madras High Court in 59 Mad 895,⁷ where the facts found were that a person who admittedly was once a member of the society had ceased to be a member five years before its dissolution. He was, therefore, not a past member as defined in S. 23. It was, therefore held that he was not liable under the Act; and the order of the liquidator was ultra vires and the civil Courts were competent to pass a decree to this effect.

The most recent case of this kind is 44 P. L. R. 31⁸ decided by Dalip Singh and Din Mohammad J.J., on 26th November 1941, in which the question is examined at great length. In that case, an arbitrator appointed under the Co-operative Societies Act had made an award against three brothers, one of whom was a major and the other two minors. No notice of the proceedings had been given to the former nor had a guardian of the minors been appointed. The learned Judges held that as the minors had not been properly represented, the award was a nullity so far as they were concerned, and in support of this conclusion they relied upon 32 Cal. 296⁹ at p. 314, 31 All 572¹⁰ and A.I.R. 1938 Lah. 515.¹¹ As against the adult brother also, they held that the proceedings were without jurisdiction and null and void, as they contravened the fundamental principle of natural justice that the party against whom a final judgment is passed must have been given an opportunity to be heard; 13 Rang. 648¹² at p. 678 47, Cal. 29¹³ and I.L.R. (1940) 1 Cal.

6. ('33) 20 A. I. R. 1938 Lah. 442 : 144 I. C. 264 : 14 Lah. 703 : 34 P.L.R. 717, Mukand Lal v. Malhotra Bank, Hafizabad.
7. ('36) 23 A.I.R. 1936 Mad. 574 : 170 I. C. 312 : 59 Mad. 895 : 70 M. L. J. 604, Vaikunta Bhat v. K. Sarvothama Rao.
8. ('42) 29 A.I.R. 1942 Lah. 129 : 201 I. C. 311 : 44 P. L. R. 31, Mahbub Hussain Shah v. Anjuman Imdad Garza.
9. ('05) 32 Cal. 296 : 32 I.A. 23 : 1 C.L.J. 584 : 9 C.W.N. 201 : 8 Sar 734 (P.C.), Khizarajmal v. Dalm.
10. ('09) 31 All 572 : 3 I. C. 864 : 36 I. A. 188 : 6 A. L. J. 822 (P. C.), Rashid-unissa v. Mahomed Ismail Khan.
11. ('38) 25 A.I.R. 1938 Lah 515 : 179 I. C. 146 : 40 P. L. R. 857, Pir Taj-ud-Din v. Khambata.
12. ('35) 22 A.I.R. 1935 Rang. 576 : 158 I.C. 865 : 13 Rang. 648 (F.B.), U Pynnya v. U Ottama.
13. ('30) 7 A.I.R. 1920 Cal. 386 : 56 I. C. 325 : 47 Cal. 29, Louis Dreyfus and Co. v. Purnothum Das Narain Das.

4. ('37) 24 A.I.R. 1937 Lah. 63 : 169 I. C. 979 : 39 P. L. R. 139, Mt. Gulab Bano v. Anjuman Imdad Bahmi Garza.

5. ('37) 24 A. I. R. 1937 Lah. 981 : 175 I. C. 840 : 40 P.L.R. 422 : I.L.R. (1937) Lah. 648, Anjuman Imdad Garza Bahami Bafindagan, Amritsar v. Mehar Din.

^a 321⁴ at p. 93. In the present case, the position is substantially the same. Here also, the liquidator had passed an order without notice to the appellant. Further, he had passed the order at a time when the appellant was under no liability whatever to contribute to the assets of the Society, the liability having been extinguished more than a year earlier when he was granted an absolute discharge by the Insolvency Court. The order of the liquidator was made in excess of the limit of his jurisdiction and the civil Court was justified in rejecting the application for its execution. The learned counsel for the respondent cited A. I. R. 1941 Lah. 284,¹⁵ recently decided by this Bench. But that case is clearly distinguishable indeed, it well illustrates the distinction between the two classes of cases mentioned in the earlier part of the judgment. There, the facts found were that the objector was a past member of the society having been registered within two years of the date of the dissolution and, therefore, clearly liable to contribution. It was, accordingly held that the liquidator was within his powers in passing an order for contribution against him and the civil Courts were not competent to go into the question of the correctness of the amount assessed by him. For the foregoing reasons, I would accept this appeal, set aside the judgment of the Single Judge and restore that of the Additional District Judge dismissing the application for execution. In the circumstances I would leave the parties to bear their own costs throughout.

BECKETT J.—I agree.

G.N./R.K.

Appeal accepted.

- ^c 14. ('40) 27 A.I.R. 1940 Cal. 198; 188 I.C. 213; I.L.R. (1940) 1 Cal. 82; 70 C. L. J. 492, Chattri Seranpore Co-operative Credit Society Ltd. v. Gopal Chandra.
15. ('41) 28 A.I.R. 1941 Lah. 284; 195 I.C. 688; 43 P. L. R. 305, Mian Allah Yar v. Anjuman Imdad Qarza.

A. I. R. (29) 1942 Lahore 240

DALIP SINGH AND SALE JJ.

Sadhu Singh—Insolvent—Petitioner

v.

Dr. Munshi Ram and others—

Creditors—Respondents.

Civil Revn. Case No. 168 of 1941, Decided on 26th February 1942, referred by Sale J., D/- 8th December 1941.

^a (a) Provincial Insolvency Act (1920), S. 41 (2) — Conditional order of discharge — Concurrent findings of Courts below that conditions have not been fulfilled must be accepted in revision (Per Sale J., in order of reference).

In the case of a conditional order of discharge concurrent findings of fact arrived at by the lower Courts that conditions of discharge have not been fulfilled must be accepted in revision. [P 241 C 1]

C. P. C. —

('40) Chitaley, S. 115, N. 13 Pt. 2; N. 29 Pt. 9.

(b) Provincial Insolvency Act (1920), S. 41 (2) — Order granting conditional discharge operates immediately — Insolvency proceedings do not terminate by that order — Insolvency Court can vary conditions though it cannot revoke order of discharge (Per Division Bench).

Under S. 41 (2) granting a conditional discharge operates immediately. It is an altogether

different question how or by what means the conditions imposed can or cannot be enforced if they have not been complied with. Since the insolvency proceedings are not terminated by an order of discharge granted subject to conditions the Insolvency Court has power to vary the conditions which it has imposed, although it cannot revoke the order of discharge, as no such power exists either in the Provincial Insolvency Act or in the Presidency Towns Insolvency Act. Section 42, Presidency Towns Insolvency Act, giving power to revoke, which is not in the Provincial Insolvency Act, refers to a totally different matter, namely, the obstruction or concealing of property by the insolvent, which has vested in the Official Receiver. That section therefore has no bearing on the point whether the Insolvency Court can revoke an order of conditional discharge: ('24) 11 A.I.R. 1924 Mad. 163, *Rel. on*; ('36) 23 A. I. R. 1936 Rang. 2 and ('32) 19 A. I. R. 1932 Cal. 623, *Approved*. [P 242 C 2; P 243 C 1]

(c) Provincial Insolvency Act (1920), S. 41 (2) (a) and (b) — Absolute or suspended order of discharge—When operates (Per Division Bench).

An order granting an absolute discharge comes into operation at once. If the discharge is suspended it does not come into operation at once but it does come into operation automatically at the end of the specified time. [P 242 C 2]

Qabul Chand for Achhru Ram—for Petitioner.

Mela Ram—for Respondents 1 to 3 and 6.

ORDER OF REFERENCE

SALE J. — This is a petition for revision of an order of the learned District Judge of Jullunder affirming an order passed by the Insolvency Sub-Judge of Jullunder. The petitioner, an insolvent, had been granted a conditional order of discharge, the operation of the order having been suspended for a period of two years which has now expired. The Courts below have now declared him an undischarged insolvent on the ground that the conditions have not been observed. The questions involved in this petition are of considerable importance to the insolvency administration in the province, viz., what is the precise effect of a conditional order of discharge and whether in the event of the conditions not being fulfilled the Court has power to revoke that order, or in the alternative to enforce the conditions. Since these questions do not appear to have been the subject of any judicial decision in this province, I am referring this case to a Division Bench for an authoritative decision.

The material facts are that the petitioner Sadhu Singh was adjudged an insolvent on 8th November 1933. On 15th December 1937, the District Judge granted him a conditional discharge, the conditions being (1) that the operation of the order is suspended for two years and any property acquired during this period should vest in the Official Receiver for the benefit of the creditors; (2) Six-monthly accounts were to be rendered by the insolvent, and any income in excess of Rs. 20 per mensem should be paid to the Official Receiver for the benefit of the creditors. On 14th June 1938, the insolvent submitted a statement of accounts for the first half year, showing a small balance of Rs. 1-1-6. On 22nd December 1938, the insolvent submitted an account for the second half year, showing practically no balance. Thereafter, he went to Africa and from there submitted a consolidated statement for the whole of the second year together with a cheque for Rs. 52-8-0. On 12th December 1939, an application was made by certain creditors that the conditional discharge should be

revoked and that he should be declared an undischarged insolvent on the ground that the insolvent had not obeyed the conditions and had absented himself from the jurisdiction of the Court without permission, by going to Africa. The Insolvency Sub-Judge held that the insolvent had disobeyed the order of the Court by leaving British India before the expiry of the suspension period and had not submitted proper accounts. Accordingly, he declared him an undischarged insolvent and granted permission to the creditors under sub-s. (2) of S. 28, Provincial Insolvency Act, to take out execution proceedings of their decrees against the insolvent, with the direction that they hand over all realisations to the Official Receiver for the benefit of the general body of creditors.

On appeal, the learned District Judge confirmed this order though on somewhat different grounds. He considered that the act of the insolvent in going to Africa was immaterial but he agreed that the insolvent had not submitted proper accounts and had not paid the surplus income to the Official Receiver. He accordingly dismissed the appeal adding the "suggestion" in the last paragraph of his judgment that: "if a reasonable sum is offered by, or on behalf of, the insolvent in the Insolvency Court, the Insolvency Court should after hearing the Official Receiver and the creditors consider afresh the question of a discharge."

In revision, Mr. Achhru Ram urges that the proceedings of both the Courts below are bad for want of jurisdiction, on the ground that the Courts have no power under the Provincial Insolvency Act to revoke an order of discharge whether conditional or not. Mr. Achhru Ram contends that a conditional order of discharge passed under S. 41 (2), Provincial Insolvency Act, takes effect automatically at the end of the period for which it was suspended, and that a mere non-fulfilment of the conditions does not affect the discharge. He urges therefore that in this case the insolvent was automatically discharged at the expiry of the period of two years for which the operation of the conditional order was suspended without regard to the question whether the conditions have or have not been fulfilled, and that if the conditions have not been fulfilled the creditors and the Official Receiver must be left to take such action as they may be advised. In reply, Mr. Mela Ram conceded that under the Provincial Insolvency Act an order of discharge, once it is given effect to, cannot be revoked but he has contended that a conditional order of discharge, even though a period of suspension may be specified in the order, does not take effect unless and until the conditions are fulfilled, and that in the present case the effect of the orders of the Courts below should be deemed to mean not that the order has been revoked but that the conditional order of discharge still remains in force because the conditions have not been fulfilled.

This is not, however, the order as actually passed which can only in my opinion be interpreted to mean that the Courts below in declaring the petitioner an undischarged insolvent have in fact revoked the order of conditional discharge. For this reason, it is impossible to maintain the order of the Courts below as it stands. But the more difficult question arises what order can in law be passed on the application of the creditors, having regard to the concurrent findings of fact arrived at by the Courts below (which must be accepted in revision) that the conditions for the discharge have not been fulfilled. My attention has been drawn by Mr.

Achhru Ram to A.I.R. 1936 Rang. 21 and the observations in the notes on p. 431, Edn. 11 of Ghosh's Provincial Insolvency Act regarding the effect of an order passed under sub-s. (2), S. 41, Provincial Insolvency Act. It was held by a single Judge in A.I.R. 1936 Rang. 21 that a conditional discharge under the provisions of this section is just as much a discharge as an absolute order of discharge and concludes the insolvency proceedings. On p. 431 of his Provincial Insolvency Act, the learned author Mr. Ghosh points out that there is no section in the Provincial Insolvency Act corresponding to Ss. 42 and 43, Presidency Towns Insolvency Act, which expressly gives power to the Court, to vary the conditions of a conditional order of discharge, and in certain circumstances, to revoke that order. Consequently, the learned author draws the inference (which is now relied upon by Mr. Achhru Ram) that the Legislature did not intend to invest the Court, in a case under the Provincial Insolvency Act, with powers to vary or revoke a conditional order of discharge.

The matter has recently come before this Court on the administrative side. On 7th January 1941 some audit objections on the accounts of the Official Receiver, Multan, for the year 1939 were brought administratively to the notice of the Honourable Judges by the District Judge of Multan. The question raised by the District Judge was what action is permissible by law in a case, where an insolvent, granted a conditional discharge on payment of a certain sum, makes default in payment, and he asked for guidance on the following questions *inter alia*:

"(1) Whether in the circumstances an Insolvency Court is empowered to annul the conditional order of discharge, (2) Whether the Insolvency Court is authorised to write off arrears if it is satisfied that they are irrecoverable."

After circulation among the Honourable Judges, a reply was issued, under the authority of the Judges to the District Judge, Multan, on 4th February 1941 to the effect that the questions "are difficult and doubtful and are of a judicial nature to which no administrative answer can be given."

Skemp J. (then Administration Judge) had in this connexion recorded a note, expressing his view that sub-s. (2) of S. 41, Provincial Insolvency Act, should be amended on the lines of S. 42, sub-s. (2), Presidency Towns Insolvency Act, in order to give the Court power to vary the conditions of a conditional discharge order and if necessary to revoke it. In regard to the question whether the Insolvency Court is authorised to write off arrears, the letter states that "it may be unjust to the creditors to write off by an administrative order arrears that may become due as a result of failure to observe conditions imposed by an order of conditional discharge. An order of conditional discharge does not terminate insolvency proceedings; and an insolvent granted such a concession continues under a disability to acquire property except for the benefit of his creditors." The case now before me raises the question whether these observations are judicially correct in view of the opinion expressed in A. I. R. 1936 Rang. 21 and in Ghosh's Provincial Insolvency Act on p. 431 of 11th Edn.

It would be, in my view, most unfair to the general body of creditors if an undischarged insolvent, who is granted a conditional order of discharge under S. 41 (2), Provincial Insolvency Act (the order

1. (86) 23 A.I.R. 1936 Rang. 2 : 161 L.C. 342, A. K. R. M. S. Chettyar Firm v. Daw Pwa Thee.

- a to remain under suspension for a specified period), and who fails to observe the conditions, is to be deemed automatically discharged on the termination of the period specified in the order. The result would apparently be that (unless a case can be made out for the prosecution of the debtor under S. 69, Provincial Insolvency Act), the creditors are left without remedy so far as the property owned by the debtor up to the date of discharge is concerned. I would therefore refer this case to a Division Bench for an authoritative ruling on the following points :
- b (1) In the case of a conditional order of discharge passed under S. 41 (2), Provincial Insolvency Act, where the order is suspended for a specified period, does the discharge take effect automatically at the end of the period irrespective of the question whether the conditions have been observed or not; and are the insolvency proceedings thereby concluded ?
- (2) Is there any remedy provided by the Provincial Insolvency Act (other than the possibility of a prosecution under S. 69) in a case where the debtor fails to observe within the period of suspension the conditions imposed upon him by the conditional order of discharge ? and (3) Has the Court any power under the Provincial Insolvency Act to vary the conditions of discharge or to revoke the conditional order ?

ORDER OF DIVISION BENCH

DALIP SINGH J. — In this case one Sadhu Singh was declared an insolvent and subsequently applied for an order of discharge. The trial Court refused the discharge. On appeal, however, the learned District Judge accepted the appeal and stated as follows :

- c "Accordingly I accept his appeal and grant the appellant discharge subject to the following conditions : (1) That the operation of discharge shall remain suspended for two years; (2) That should the appellant acquire any property during that period the same shall vest in the official receiver for the benefit of the creditors, and (3) That the appellant shall render six monthly account of his income to the official receiver and make over to him for the benefit of the creditors all incomes over and above the sum of Rs. 20 per month."

- d It appears that the insolvent furnished an account for the first two half years, but these accounts were objected to by the creditors and the finding appears to be that these accounts were unsatisfactory. In the third half year he rendered no account and went off to South Africa. From there he sent a consolidated account for the third and fourth half years, also a cheque for Rs. 52 odd, which he asserted was the balance of his income over his expenditure. In the first and second half year accounts he appears to have allowed himself more for expenses than Rs. 20 a month that was allowed by the learned District Judge. In the last account for the third and fourth half years, the objection seems to be that he has not fully accounted for his income. Upon these facts and findings on the application by certain creditors that the conditional discharge should be revoked, the learned Insolvency Judge held that the insolvent had disobeyed the order of the Court by leaving British India before the expiry of the suspension period, namely, two years, and had not submitted proper accounts. Accordingly he revoked the order of discharge, declared him an undischarged insolvent and granted permission to the creditors under sub-s. (2) of S. 28, Provincial Insolvency Act, to take out execution proceedings of their decrees against the insolvent with a direction that all realisations be handed over to the Official Receiver for

the benefit of the general body of creditors. On appeal the learned District Judge dismissed the appeal not on the ground of the insolvent's leaving British India but on the ground that he had not submitted proper accounts and had not paid the surplus income to the Official Receiver. He dismissed the appeal adding a suggestion that if a reasonable sum was offered by or on behalf of the insolvent, the matter of discharge could be reconsidered afresh.

On revision to this Court the point was raised that the orders passed were passed without jurisdiction because neither the Insolvency Judge nor the District Judge had any jurisdiction to revoke the conditional discharge on the ground of non-fulfilment of conditions. It was urged, as has been urged before us, that the order of discharge, although conditional, nevertheless operates immediately and the conditions may or may not be fulfilled but the order of discharge cannot be revoked. The point being without direct authority of this Court was referred by the learned Judge in Single Bench to a Division Bench for disposal. In the main the contention before the Bench turns on the question whether an order of conditional discharge operates immediately or not. By way of analogy several points have been brought in but these do not really directly affect the matter at issue and do not really, if analysed, throw any light on the matter. There are two authorities which appear to be directly in point : One is A.I.R. 1936 Rang. 2,¹ a Single Bench ruling of that High Court which purports to follow A.I.R. 1932 Cal. 623,² a Division Bench judgment of the Calcutta High Court. In this latter ruling there is no direct reference to the point involved but by implication it might be argued that the learned Judges intended that the order of conditional discharge should come into operation at once and the condition should be fulfilled subsequently as directed by them. If we turn to the section itself, the section is the same both in the Provincial and the Presidency Insolvency Acts. There does not appear to be any other ruling directly in point.

In 45 M. L. J. 166³ the point arose but was disposed of on the interpretation of the order where it was held that the order did not purport to give a discharge at all until the conditions had been fulfilled. It is impossible in the present case to read the order of the learned District Judge as implying any such thing, as the words are that he grants the order of discharge subject to certain conditions. As I read the Insolvency Act it appears to me that under S. 41 (a), (b) and (c) the discharge may be either absolute or suspended or conditional. If the discharge is absolute, it must obviously come into operation at once. If the discharge is suspended, then obviously it does not come into operation at once but it does automatically come into operation at the end of the specified time. As regards the conditional discharge I would be inclined to hold that the order operates immediately. It is an altogether different question how or by what means the conditions imposed can or cannot be enforced if they have not been complied with. This depends on whether it can be held that the insolvency proceedings are necessarily terminated by a conditional discharge. Now, whatever might be the position in the case of an absolute discharge, I fail to see how

2. ('82) 19 A.I.R. 1932 Cal. 623 : 138 I.C. 745 : 55 C.L.J. 94, Prayag Shaha Sahab Ram v. Dwijapada Roy.

3. ('24) 11 A.I.R. 1924 Mad. 163 : 75 I.C. 572 : 47 Mad. 120 : 45 M.L.J. 166, Sivasubramania Pillai v. Theethappa Pillai.

a the order of a Court granting a conditional discharge only can possibly be held to terminate the insolvency proceedings until the conditions imposed have been fulfilled. This view is supported by the ruling of the Madras High Court already referred to, 45 M.L.J. 166.³ If this is so, then the proper remedy in the case of an insolvent who has subsequently acquired property or has not given up all his surplus income, as fixed in or by the conditions of the order, may be to proceed against him in the Insolvency Court itself and obtain an order from the Insolvency Court either that he deliver possession of the property or the money amounting to the surplus income which has not been accounted for. If this is incorrect, then the remedy is by a separate suit either by the Official Receiver with the leave of the Court or by any creditor concerned in the matter. It is not necessary for us to decide this point which must be left for disposal by the Insolvency Court.

b It is sufficient for the present purpose to hold that this petition must be accepted and the order declaring the insolvent still an undischarged insolvent must be set aside. This order to be set aside necessarily involves a revocation of the order of conditional discharge. Had such an order been contemplated, I would have expected to see a section giving this power to the Insolvency Court in the Act itself, but no such power exists either in the Provincial Insolvency Act or in the Presidency Towns Insolvency Act. The section in the Presidency Towns Insolvency Act giving power to revoke, which is not in the Provincial Insolvency Act, refers to a totally different matter, namely the obstruction or concealment of property by the insolvent, which has vested in the Official Receiver. That section therefore has no bearing on the point now before us at all. As at present advised I am inclined to think that the remedy is by way of an application to the Insolvency Court to pass an order that the money due, if any, from the insolvent should be decreed against him by the Insolvency Court and the Official Receiver seek anew such remedies by way of execution of that order as he may be advised. I do not, however, express any final opinion on this point. The result is that this petition must be accepted. In view of the conduct of the insolvent shown by the findings of the Courts below I would leave the parties to bear their own costs throughout.

c SALE J. — I agree. Since the insolvency proceedings are not terminated by an order of discharge granted subject to conditions, it follows that the Insolvency Court has power to vary the conditions which it has imposed, although, of course, it cannot revoke the order of discharge.

G.N./R.K.

Petition accepted.

* A. I. R. (29) 1932 Lahore 243

TEK CHAND AND DIN MOHAMMAD JJ.

*Thakur Madho Singh and another —
Plaintiffs — Appellants*

v.

*Lieut. James R. B. Skinner and others
— Defendants—Respondents.*

First Appeals Nos. 430 and 431 of 1932, and 64, 65 and 66 of 1939, Decided on 19th January 1942, from decrees of Senior Sub-Judge, Hissar, D/- 29th July 1938.

(a) Hindu law — Gift—Principles governing gift stated—Gift held valid.

According to Hindu Law under which writing is not necessary for the validity of any transaction apart from the Transfer of Property Act, acceptance by the donee is essential to the validity of a gift even though it is by a registered instrument. Delivery or taking of possession is but one of the modes of acceptance. It is, however, sufficient if the change of possession is such as the nature of the case admits of. Where the donor is out of possession and has done everything in his power to complete the gift, the fact that possession has not been given is no answer to a suit by the donee against the obstructing party. Section 123, T. P. Act, has superseded the rule of Hindu law, if any, that delivery of possession is absolutely essential for the completion of a gift. [P 246 C 2]

The deed of gift was executed in the presence of the donee. The deed was written and registered at the instance of the donors. The donors afterwards made an application to the revenue authorities for entering the land in the donee's name and they further agreed to the donee being shown in personal possession of the land which had previously been entered in their possession and later, when the gift was challenged, they made a common cause with the donee to support the gift:

Held that as the donee was present at the time of the execution of the gift deed it could not be urged that he had not accepted it; and since the donors had done all they could to complete the gift, the gift was not open to any legal objection whatever: 11 Cal. 121 (P. C.); 45 P. R. 1906; 52 P. R. 1908 and (25) 12 A. I. R. 1925 Lah. 648, *Rel. on*; 21 P. L. R. 1901, *Exptl.* [P 247 C 2]

Hindu law—

(40) Mulla, Page 424 Pt. (g); Page 425 Pt. (z); Page 426 Pt. (b).

(38) Gour, Page 745 Para. 1838, Page 748 S. 230.

T. P. Act—

(36) Mulla, Page 676 Pts. (p), (q); Page 677 Pt. (r).

(34) Mitra, Page 654 N. 631.

(b) Practice — New plea — Appeal — New grounds especially when involving issues of fact such as that gift was entirely bogus or that it was invalid as donee had not accepted it cannot be raised for first time.

New grounds should not be allowed to be raised for the first time in appeal especially when they involve issues of fact such as that the gift was altogether bogus or that it was invalid as the donee had not accepted it when they were not expressly raised in the plaint or in the statement before issues. [P 247 C 2]

C. P. C. —

(40) Chitaley, O. 41 R. 1, N. 12 Pt. 1.

(41) Mulla, Page 1155 Pt. (l).

(c) Practice—New plea—Appeal—Plea as to bogus nature of transaction (exchange) cannot be entertained for first time.

The plea as to bogus nature of a transaction (exchange) cannot be entertained in appeal on the ground that it was not clearly raised in the plaint relating to the transaction. [P 247 C 2]

C. P. C. —

(40) Chitaley, O. 41 R. 1, N. 12 Pt. 1.

(41) Mulla, Page 1155 Pt. (l).

* (d) Punjab Alienation of Land Act (13 of 1900), S. 3—Operation of S. 3 is restricted by S. 298 (2) (a), Government of India Act, only to sales and mortgages — S. 3 does not apply to

exchanges — S. 292, Government of India Act must be read subject to S. 298 of that Act—S. 293, Government of India Act, cannot be successfully invoked to support contention that S. 298, Government of India Act, does not alter Punjab Land Alienation Act : 42 P. L. R. 628 = ('41) 28 A.I.R. 1941 Lah. 27=192 I.C. 303, *OVER- RULLED*.

Since two forms of alienation alone namely sales and mortgages are specifically mentioned in the saving clause in S. 298 (2), Government of India Act, the others must be taken to have been excluded on the rule of construction that what is expressed makes what is not expressed cease. Consequently S. 298 (2), Government of India Act, limits the operation of S. 3, Punjab Land Alienation Act, only to sales and mortgages. Therefore, only those parts of the Punjab Alienation of Land Act are now in force in the Punjab, which relate to sales and mortgages of agricultural land and the remaining provisions of that Act prohibiting or restricting other forms of alienations, being repugnant to S. 298 (1), Government of India Act, 1935, and not being within the exception contained in sub-s. (2) of that section, are no longer law after 1st April 1937. The effect of S. 298, Government of India Act, therefore, is that on and after 1st April 1937 a person belonging to a notified agricultural tribe under S. 3, Punjab Alienation of Land Act, is free to exchange, gift, or bequeath agricultural land or grant occupancy rights in it to a person who does not belong to any of the agricultural tribes in the same group. Section 292, Government of India Act, no doubt saves the existing law but it is clearly laid down there that the saving clause is subject to the other provisions of the Government of India Act. Since S. 298, Government of India Act, comes directly into conflict with S. 3, Punjab Alienation of Land Act, so far as exchanges are concerned, S. 292 must be read subject to S. 298 with the result that the latter section will prevail over any other existing law in force. Similarly, S. 293, Government of India Act, cannot be successfully invoked in support of the contention that the Punjab Land Alienation Act has not been in any way altered or affected by S. 298, Government of India Act. Section 293 can in no way be treated as a saving clause merely because by an order in Council the Punjab Alienation of Land Act too was in some respects altered or modified so as to be brought into accord with the Government of India Act: 42 P.L.R. 628=(‘41) 28 A.I.R. 1941 Lah. 27=192 I.C. 303, *OVERRULLED*; ('41) 28 A. I. R. 1941 Lah. 182 (F. B.) (*View of Dalip Singh J.*). *Rel. on.* [P 248 C 2; P 251 C 1,2]

(e) Interpretation of Statutes — Exception must be construed strictly (*Per Din Mohammad J.*).

One fundamental principle which governs the interpretation of statutes is that an exception must be construed strictly. [P 248 C 2]

C. P. C.—

(‘40) Chitaley, Preamble N. 14 Pt. 9.

(f) Civil P. C. (1908), O. 20, R. 14 — Pre-emption suit decreed — Title of plaintiff pre-emptor accrues from date of payment of purchase money together with any costs decreed against plaintiff into Court.

Under O. 20, R. 14 when a pre-emption suit is decreed it is only when payment of the purchase money is made into Court together with the costs if any decreed against the plaintiff pre-emptor that the defendant vendee is required to deliver posses-

sion of the property and therefore the title of the plaintiff pre-emptor must be deemed to have accrued from the date of such payment : ('16) 3 A.I.R. 1916 P. C. 179, *Rel. on.* [P 249 C 1]

C. P. C.—

(‘40) Chitaley, O. 20 R. 14 N. 8 Pt. 1.

(‘41) Mulla, Page 733 Pt. (2).

(g) Punjab Pre-emption Act (1 of 1913), S. 15 (c) fourthly—Vendee of occupancy rights acquiring proprietary rights — Vendee acquires status of “owner of estate” so as to defeat pre-emption claim of his rival occupancy tenant.

Where the vendee of an occupancy land acquires proprietary rights in the land his status becomes that of an “owner of estate” from the date of his acquisition of the proprietary rights so as to defeat the claim for pre-emption of his rival occupancy tenant : ('39) 26 A.I.R. 1939 Lah. 77 and ('32) 19 A.I.R. 1932 P. C. 57, *Rel. on.* [P 249 C 1]

(h) Punjab Alienation of Land Act (13 of 1900), S. 3—Provisions of Act with regard to sales and mortgages preserved by S. 298 (2), Government of India Act, must be taken as restricted to agricultural land as used in its ordinary sense and not in its extended meaning under S. 2 (3) of Punjab Act—Enlarged definition of land in S. 2 (3) of Punjab Act cannot be referred to to interpret Government of India Act (*Per Tek Chand J.*).

Even with regard to sales and mortgages the provisions of the Alienation of Land Act, which are preserved by S. 298 (2) must now be restricted only to agricultural land as used in its ordinary sense (i.e., land which is used for purposes of agriculture or purposes subservient to agriculture, and not in the extended meaning given to it in S. 2 (3), Punjab Alienation of Land Act. The Government of India Act does not contain any definition of “agricultural land;” the enlarged definition given in the Punjab Alienation of Land Act cannot be referred to to interpret an Act of Parliament. [P 250 C 2]

(i) Interpretation of Statutes — Court must proceed on assumption that Legislature does not make mistakes (*Per Tek Chand J.*).

In construing an enactment it is not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. A Court of law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes : 1891 A. C. 531, *Rel. on.*

[P 251 C 1]

C. P. C.—

(‘40) Chitaley, Preamble N. 7 Pt. 9.

(j) Interpretation of Statutes—*Casus omissus* —Rule of construction stated (*Per Tek Chand J.*).

As to *casus omissus*, the rule of construction of statutes is that the Judges may not wrest the language of Parliament even to avoid an obvious mischief. When an Act contains special saving of another Act, and omits all allusion to a third Act in *pari materia* it is safer to presume that the omission is deliberate than that it is due to forgetfulness or made *per incuriam* (through want of care). Even if the omission flows from forgetfulness, those who claim the benefit of the Act, the reservation of which is omitted cannot succeed : (1887) 36 Ch. D. 573, *Rel. on.* [P 251 C 1]

A Court is not authorised to alter a word so as to produce a *casus omissus* : (1888) 13 A. C. 595, *Rel. on.* [P 251 C 1]

The Court cannot aid the Legislature's defective phrasing of an Act. The Court cannot add and mend, and, by construction, make up deficiencies which are left there, in other words the language of Acts of Parliament, and more especially of modern Acts, must neither be extended beyond its natural and proper limits in order to supply omissions or defects, nor strained to meet the justice of an individual case : 6 Moo. P. C. 1, *Rel. on.* [P 251 C 2]

If there is a *casus omissus* it is for others than the Courts to remedy the defect : ('33) 20 A. I. R. 1933 P. C. 63, *Rel. on.* [P 251 C 2]

(k) Interpretation of Statutes—Parliamentary history of enactment is not admissible to explain its meaning—Report of Joint Select Committee on proposals contained in White Paper cannot be referred to in interpreting Government of India Act (Per *Telo Chand J.*).

The Parliamentary history of an enactment is not admissible to explain its meaning. The inference to be drawn from comparing the language of the Act with the declared intention of its framers would be that the difference between the two was not accidental but intentional. The proceedings or the report of the Joint Select Committee of the two Houses of Parliament (on a consideration of which a measure was introduced in Parliament which ultimately became the Government of India Act) appointed to examine and report on the proposals contained in White Paper cannot be said to represent the will of the Parliament as a whole and cannot be referred to to interpret the Government of India Act : 1935 A. C. 445, *Rel. on.* [P 252 C 1]

C. P. C.—

('40) Chitaley, Preamble N. 9 Pt. 2.

('41) Mulla, Page 3 Pt. (m).

M. C. Mahajan, N. L. Bhalla and Inder Dev Dua for R. O. Soni—for Appellants.

J. N. Aggarwal, Vishnu Datt and Parkash Chand—for Respondents.

DIN MOHAMMAD J. — This judgment will dispose of Regular First Appeals Nos. 430 and 431 of 1938 as well as Regular First Appeals Nos. 64, 65 and 66 of 1939. The facts are these : On 25th August 1934, Lt. James R. R. Skinner executed a sale deed of his entire estate in three villages, Jagmalera, Chahal Kotli and Kanjarwala, amounting to one-half of the villages mentioned above, in favour of Seth Mul Chand and Seth Madan Chand for Rupees 85,000. This document was registered on 28th August 1934. On 10th September 1934, Mr. Hercules Leonard Skinner sold the remaining one-half share of the three villages mentioned above along with one-half share of village Alipur to the same vendee for Rs. 1,05,000. On 31st May 1935, Varyam and Lukman, two of the occupancy tenants in Jagmalera, sold their rights to the sons and grandsons of the original vendees. On 27th August 1935, Thakar Madho Singh and Thakar Hamir Singh instituted two pre-emption suits in respect of the sale of Jagmalera lands involved in the two sale deeds executed by the Skinner brothers. In both the suits the right of pre-emption was claimed on the basis of the plaintiffs being occupancy tenants in Jagmalera, and the vendees being mere strangers.

On 31st May 1937, the vendees made a gift of land measuring 186 biswas 19 biswas situate in Jagmalera to one Ram Chandar. This land was in the possession of Varyam, Nizam, Mehman and Nur Mohammad as occupancy tenants, among others. On 1st June 1937, Varyam and Nizam exchanged their occupancy rights in Jagmalera with the vendees

and received some land from them in another village. Similarly, Mehman and Nur Mohammad made an exchange with the vendees of their occupancy rights in Jagmalera and obtained some land elsewhere. Consequent upon these transactions, Thakar Madho Singh and Thakar Hamir Singh instituted two suits on 25th June 1937 against the persons interested in these transactions. The reliefs claimed in these suits were : (1) for a declaration that the transactions were "null and void, invalid, ineffectual and liable to be cancelled" and (2) for possession by pre-emption of the occupancy rights transferred on the ground of the transactions being sales clothed in the garb of exchanges. On 19th July 1937, a fifth suit was instituted by the same two plaintiffs in respect of the transaction of gift made to Ram Chandar. In that suit, too, the relief claimed was similar to the one claimed in the suits relating to the two exchanges referred to above. The two pre-emption suits were resisted mainly on the ground that the vendees had improved their status during the pendency of the suits by acquiring occupancy rights in Jagmalera. In the other three suits resistance was put forward on the ground that the transactions covered by those suits did not amount to sales and were consequently not pre-emptible. The trial Judge gave effect to the pleas raised on behalf of the vendees and dismissed all the five suits with costs.

From the judgment in the two pre-emption suits, appeals were preferred to this Court, while from the judgment in the three suits relating to exchanges and gift appeals were taken to the Court of the District Judge. Those appeals, however, were also transferred to this Court, inasmuch as the decision in the pre-emption suits mainly hinged on the decision in those cases. Regular First Appeals Nos. 430 and 431 of 1938 relate to the pre-emption suits and Regular First Appeals Nos. 64, 65 and 66 of 1939 relate to the transactions of exchanges and gift. These appeals came on for hearing before a Division Bench on 17th June 1940. The first question that arose for decision before the learned Judges was whether a vendee could improve his status during the pendency of a pre-emption suit and thus defeat a pre-emptor whose right was admittedly superior to that of the vendee on the date of the sale. There was some conflict of authority on this matter and the learned Judges consequently referred the matter to a Full Bench. Various aspects of the questions were discussed before the Full Bench and on them the following conclusions were reached : (a) that a vendee can improve his status effectively right upto the adjudication of the suit against him; (b) that this improvement can, in certain circumstances, be effected even by dealing with the land which is the subject-matter of the suit; (c) that the effect of the rule of lis pendens is only to bind the transferee if he happens to be a third person with any decree that is made in the suit, even if he is no party to it; (d) that the acquisitions based on the transfer pendente lite can arm the vendee with an effective weapon to destroy the pre-emptor's superior claim; and (e) that consequently the acquisition made by the present vendees in 1937 afforded a legally valid defence to the pre-emptor's suits.

It may be observed that in respect of the acquisitions made in 1935 the Full Bench came to the conclusion that the doctrine of merger applied and that inasmuch as the acquisitions had been made by the members of the same joint Hindu family, the occupancy rights merged in the proprietary

rights acquired by the vendees and thus ceased to afford an effective defence to the pre-emptors' suits. The cases were then referred back to the Division Bench for disposal on the merits in the light of the decision arrived at on the questions involved before the Full Bench. The gift made to Ram Chandar being the foundation of the defence put forward by the vendees, it will be advisable to take up that case first. Counsel for the appellants urges that it was a bogus transaction altogether, that false recitals were made in the deed and that the gift was legally invalid inasmuch as it had not been accompanied by possession nor had it been accepted by the donee.

This gift, as stated above, was made on 31st May 1937 by Seth Madan Chand and Seth Champa Lal, son of Seth Mul Chand, to Ram Chandar, resident of Chhuru, Bikaner State. The donors also belonged to the same place. It was stated in the deed that Seth Mul Chand, who was a brother of Seth Madan Chand and the father of Seth Champa Lal, had immediately before his death directed that some land should be gifted to Ram Chandar in lieu of the old services rendered by him to the family and that it was in accordance with that direction that the gift of the land of the value of Rs. 3000 was being made. It was further mentioned in the deed that possession had been delivered to the donee who had been invested with full proprietary rights in relation to the land covered by the deed. It was also undertaken by the donors that a mutation would be effected in respect of this gift. The right of partition was also conferred on the donee as well as the right of separation of the khatas. It was further emphasised in the deed that the donee had become absolute owner of the gifted land and that the gift was valid and legal. This document was signed by both the donors and attested by two witnesses. It was presented for registration to the Sub-Registrar on the same day and was duly registered. After the registration of the document, both the donors made a joint application to the Naib Tahsildar, Sirsa, praying for mutation of the gifted land in the name of Ram Chandar. In that application, too, it was mentioned that a gift had been made to Ram Chandar of land situate in Jagmalera of the value of Rs. 3000 for services rendered by the donee and that the document had been duly registered. It was added that as the donors were the residents of Chhuru, they might not be able to be present at the time of the attestation of the mutation and they requested that their statements be recorded and the mutation sanctioned in their absence. Thereupon, the Naib Tahsildar recorded a joint statement of the two donors wherein all the allegations made in the deed as well as in the application were reiterated. The papers were then directed to be sent to the Patwari of the village through the Girdawar for making an entry in the relevant papers. All this happened on 31st May. The entry having been duly made in the register of mutations was finally attested on 4th June 1937. Of the land gifted, 17 kanals and 19 marlas were banjar qadim under the personal cultivation of the proprietors and the same were shown under the personal cultivation of Ram Chandar in the revenue papers. Of the remaining land, one-half of 38 kanals and 18 marlas was in the possession of Varyam and Nizam as occupancy tenants under S. 5; 91 kanals and 15 marlas were in the possession of Thakar Madho Singh and his brothers in the same capacity; and 32 kanals and 17 marlas in the possession of Mehram and Nar Mohammad also in the same capacity. Of these areas, Ram Chandar was shown as

the proprietor and the occupancy tenants mentioned above in the column of cultivators. The remaining one-half of 38 kanals and 18 marlas mentioned above was shown in the possession of Ram Chandar. Besides, Thakar Madho Singh and Thakur Hamir Singh were shown as non-occupancy tenants of 5 kanals and 10 marlas of land under Ram Chandar.

Counsel for the appellants, however, argues that these are all mere paper transactions and that Ram Chandar was present neither at the time of the gift nor at the time of registration nor at the time of mutation. He further urges that the joint family property could not be gifted without the consent of the other members, that the deed of gift remained with the so-called donors and was produced by them in Court, that no reason was assigned why such a valuable property was gifted to Ram Chandar and that Ram Chandar not having accepted the gift on 31st May 1937, no title passed to him on that day so as to validate the transactions that subsequently followed on the gift. Before determining whether the objections advanced by the appellants' counsel are forceful or not, it will be necessary first to see what the requirements of a valid gift are under the provisions of Hindu law. Mulla in his Principles of Hindu Law at p. 424 states as follows:

"A gift under pure Hindu law need not be in writing. But a gift under that law is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee. Mere registration of a deed of gift is not equivalent to delivery of possession; it is not therefore sufficient to pass the title of the property from the donor to the donee. But where from the nature of the case physical possession cannot be delivered, it is enough to validate a gift if the donor has done all that he could to complete the gift, so as to entitle the donee to obtain possession."

This exposition of law, if I may say so with all respect, is not so clear as the one given in Mayne's Treatise on Hindu Law and Usage, Edn. 10, at pp. 865 and 866, para. 725. It runs as follows:

"Where the Transfer of Property Act is not in force, a gift may be made orally or in writing, since writing is not necessary under Hindu law for the validity of any transaction, apart from the Transfer of Property Act, it has generally been held that under Hindu law delivery of possession is essential to complete a gift even though it is by a registered instrument. It would be more correct to say that according to Hindu law, acceptance by the donee is essential to the validity of the gift and delivery or taking of possession is but one of the modes of acceptance. It is, however, sufficient if the change of possession is such as the nature of the case admits of. Where the donor is out of possession and has done everything in his power to complete the gift, the fact that possession has not been given is no answer to a suit by the donee against the obstructing party. It is now settled that S. 123, T. P. Act, has superseded the rule of Hindu law, if any, that delivery of possession is absolutely essential for the completion of a gift."

In para. 726 it is added:

"Acceptance of a gift required by S. 122, T. P. Act, may be either express or implied. On delivery of the deed of gift to the donee, even before the registration there is an acceptance of the gift and it is not open to the donor to revoke the gift after its acceptance and before its registration."

The text of the Mitakshara quoted under para. 725 at page 866 which also is more comprehensive

a than the one reproduced by Mulla at page 426, is in the following words :

"Gift consists in the relinquishment of one's own right, and the creation of the right of another and the creation of another man's right is completed on that other's acceptance of the gift, but not otherwise. Acceptance is made by three means, mental, verbal or corporeal. Mental acceptance is the determination to appropriate; verbal acceptance is the utterance of the expression, 'this is mine or the like;' corporeal acceptance is manifold, as by touching. In the case of land, as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some little possession; otherwise the gift, sale or other transfer is not complete."

b As to how their Lordships of the Privy Council have interpreted these provisions, reference may be made to 11 Cal. 121.¹ At p. 130, it is stated that one of the questions falling for their Lordships' decision was whether the gift which was the basis of the plaintiff's title was invalid inasmuch as the donor was out of possession and no possession was ever given to the donee. In this connexion their Lordships at pages 131-32 observed :

"But it must be observed that in this case the dispute as to the validity of the gift is not between the donee and the donor or a person claiming under her. The donor is a defendant and affirms the validity. The person who disputes it claims adversely to both."

After referring to the various authorities cited before their Lordships, it was remarked :

c "In this case the donor has in fact done all she could and as she still desires to support her gift, there is no question of compelling her to do more."

It may be remarked that what the donor had done in the case before their Lordships, besides other things, was to admit the plaintiff's claim in her written statement. In 21 P. L. R. 1901,² Harris J. held that under Hindu law delivery of possession is not essential to complete a gift but that there must be acceptance on the part of the donee and on that aspect of the case the learned Judge went on to say that the production of the registered deed of gift may be some proof of acceptance. In 45 P. R. 1906,³ a Division Bench composed of Johnstone and Rattigan JJ., after referring to 11 Cal. 121,¹ remarked that where a donor has in the circumstances of the particular case taken all possible steps to complete a gift, the non-delivery of actual possession is immaterial. The circumstances that were considered sufficient in that case were the execution and the registration of the deed of gift by the donor. In 52 P. R. 1908,⁴ another Division Bench, composed of Chatterji and Johnstone JJ., held that the execution and registration of a deed of gift along with the power to receive the document after registration were sufficient for the validity of a gift under Hindu law. In A. I. R. 1925 Lah. 648,⁵ this authority was followed by a Division Bench of this Court composed of Scott-Smith and Harrison JJ.

1. ('85) 11 Cal. 121 ; 11 I. A. 218 : 4 Sar. 578 (P. C.), Kalidas Mullik v. Kanhaya Lal.

2. ('01) 21 P. L. R. 1901, Ram Chand v. Devi Chand.

3. ('06) 45 P. R. 1906 : 120 P. L. R. 1906, Partap Singh v. Fatta.

4. ('08) 52 P. R. 1908 : 103 P. W. R. 1908, Ram Charan Das v. Bhagwati.

5. ('25) 12 A. I. R. 1925 Lah. 648 : 39 I. C. 326, Bhagwan Singh v. Kirpa Ram.

Applying, therefore, the principles that govern gifts under Hindu law to the present case, it is not possible to hold that there was no valid gift in favour of Ram Chandar. Dhanpat Singh, D. W. 4, in his statement recorded on 6th December 1937, has clearly stated that Ram Chandar was present at Sirsa when the deed of gift was executed. It is true that Inder Sen, petition-writer, stated on 4th December 1937 that, as far as he could recollect, Ram Chandar was not present when the deed of gift was written, but the statement of Dhanpat Singh, who knew Ram Chandar well, is more reliable on this matter. This being so, it cannot be urged that the gift was made in the absence of Ram Chandar and, consequently, it cannot be argued that he had not accepted it. In addition, the donors had, as stated above, done all that they could do to complete the gift. The deed was written and registered at their instance; they afterwards made an application to the revenue authorities for entering the land in Ram Chandar's name and they further agreed to Ram Chandar being shown in personal possession of the land which had previously been entered in their possession and later, when the gift was challenged, they made a common cause with Ram Chandar to support the gift. In the light of these circumstances, I would hold that the gift in favour of Ram Chandar was not open to any legal objection whatever.

It may also be observed that in the plaint it was not expressly urged that the gift was altogether bogus. Counsel for the appellants refers to the averments made in para. 3 of the plaint where it is said that the gift was fictitious and for show and that Ram Chandar being a resident of another ilaga had no need to acquire land in Jagmalera, but all that the plaintiffs intended to convey by these averments was that what was really a sale had been falsely described as a gift. Further, it was not urged in the plaint that the gift was invalid as Ram Chandar had not accepted it. That the defendants also took the plaint in that light is clear from the pleas put in by them. On 18th August when counsel for the plaintiffs was examined before issues, he confined his attack on the gift to two grounds (1) that it had been made during the pendency of the suit and (2) that possession had not been transferred. It is on this score that counsel for the respondents has contended that the appellants should not be allowed to raise new grounds for the first time at this stage, especially as they involve issues of fact and I am inclined to hold that there is force in this contention. Had the matter been expressly raised in the plaint or in the statement before issues, the vendees might have been in a position to meet these objections effectively by producing Ram Chandar or examining other relevant evidence. Counsel for the appellants has given up the plea that the gift was really a sale and hence subject to pre-emption. On the grounds stated above, I would hold that the gift was valid and accordingly dismiss Regular First Appeal No. 85 of 1939.

Coming now to the suits relating to the exchanges. Here, too, a similar plea as to the bogus nature of the transaction is pressed but it cannot be entertained on the ground that it was not clearly raised in either of the two plaints relating to these transactions. The matter in controversy between the parties can best be determined from the issues struck at their instance in the Court below and there is not the least indication therein that any such question was raised. From the copies of the revenue records produced in the case, it is evident that these exchanges were given effect to immediately.

tely after they were made and cannot in any circumstances be held to be fictitious. On the question whether these exchanges offend against the provisions of the Land Alienation Act, the case of Mehman and Nur Mohammad stands on a different footing from that of Varyam and Nizam. Counsel for the appellants urged that as Mehman and Nur Mohammad were Pathans and thus members of a notified agricultural tribe under S. 4, Land Alienation Act, while the persons with whom the exchanges were effected were admittedly mahajans and thus non-agriculturists, the exchange was legally invalid having been made without the consent of the Deputy Commissioner. This argument, however, is erroneous, inasmuch as Mehman and Nur Mohammad are not Pathans but Biloch Mamar and this tribe has not been notified as an agricultural tribe in the District of Hissar under S. 4, Alienation of Land Act. It is obvious that both Mehman and Nur Mohammad had expressly stated in their pleas that they were not Pathans but Biloch and this position was not controverted by the plaintiffs. It is further significant that in all the revenue papers as well as other documents existing on the record, they were uniformly described as Biloch. The exchange made by Mehman and Nur Mohammad, therefore, does not come within the mischief of S. 3, Alienation of Land Act, and is perfectly valid. On this finding, no other issue remains to be decided. I would accordingly dismiss Regular First Appeal No. 64 of 1939.

In this view of the case it may not be necessary for the purposes of the pre-emption suits to decide the validity of the exchange made by Varyam and Nizam, inasmuch as for the purpose of these suits a finding in the case of Mehman and Nur Mohammad alone will be decisive. But as this question is material in the disposal of the declaratory relief claimed in respect of the exchange in question, it is necessary to discuss that matter independently. On the terms of the Punjab Alienation of Land Act, there can be no doubt on the subject of this exchange. Varyam and Nizam are admittedly members of a notified agricultural tribe and were under S. 3, Punjab Alienation of Land Act, not permitted to make any permanent alienation in favour of a person who was not a member of an agricultural tribe. The term "permanent alienation" as defined in S. 2 of the Act includes exchanges. Counsel for the respondents however urges that, in view of S. 298, Government of India Act, the Punjab Alienation of Land Act, so far as it prohibits exchanges by a member of an agricultural tribe with a person who is not a member of an agricultural tribe, has been automatically repealed. Sub-section (1) of this section reads as follows :

"No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them . . . be prohibited on any such ground from acquiring, holding or disposing of property . . . in British India."

To this is appended an exception in sub-s. 2 (a) which says :

"Nothing in this section shall affect the operation of any law which prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognized by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class."

This evidently refers in the Punjab to the Punjab Alienation of Land Act, which is the principal Act introducing such prohibition in this province. Con-

sidering that S. 3, Land Alienation Act, prohibited not only sales and mortgages but several other transactions too like gifts, exchanges, wills and grants of occupancy rights, it is obvious that the operation of this section has been expressly restricted by S. 298, sub-s. 2 (a) in so far as these transactions have not been included therein. One fundamental principle that governs the interpretation of statutes is that an exception must be construed strictly and by no stretch of language can the word "exchange" be read into the word "sale" in this exception, with the result that, as the law stands at present, there is no prohibition against an exchange by a member of an agricultural tribe with a member of a non-agricultural tribe.

Counsel for the appellants, however, relies on Ss. 292 and 293, Government of India Act, and contends that the Punjab Alienation of Land Act has not been in any way altered or affected by S. 298. Section 292 no doubt saves the existing law but it is clearly laid down there that the saving clause is subject to the other provisions of the Government of India Act. Considering, therefore, that S. 298, Government of India Act, comes directly into conflict with S. 3, Punjab Alienation of Land Act, so far as exchanges are concerned, S. 292 shall have to be read subject to S. 298 with the result that the latter section will prevail over any other existing law in force. Similarly, S. 293 cannot be successfully invoked in this matter. All that that section lays down is that His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the order, any law in force in British India shall, until repealed or amended by a competent Legislature, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act, and this can in no way be treated as a saving clause merely because by an Order in Council the Punjab Alienation of Land Act too was in some respects altered or modified so as to be brought into accord with the Government of India Act. No other question arises in the case of Varyam and Nizam and I would accordingly dismiss Regular First Appeal No. 66 of 1939.

The decision of these appeals automatically decides the main cases, inasmuch as once the gift and exchanges are held to be valid, the vendees acquire a status equal to that of the pre-emptors in both these suits and will under the Full Bench decision be in a position effectively to resist them. Counsel for the appellants, however, urges that so far as 91 kanals 15 marlas of land are concerned, in which the plaintiffs are occupancy tenants themselves, they are entitled to pre-empt the sale in preference to the vendees under S. 15 (c) (fourthly) of the Punjab Pre-emption Act. Had the status of the vendees been that of occupancy tenants alone by virtue of the exchanges effected between them and the other occupancy tenants, the plaintiffs would have been on firm ground. But in this case the dismissal of the plaintiffs' suits as regards the rest of the land, in my view, disentitles them to succeed even in respect of their own occupancy holding, inasmuch as the vendees' case will fall under S. 15 (c) (thirdly), as it cannot be denied that they acquired proprietary rights in respect of the land in suit on 25th August and 10th September 1934 respectively. From the day when the sales were effected in their favour, they acquired the status of "owners of the estate." The mere fact that the sales were subject to pre-emption did not in any way derogate from their

a status and even when the pre-emption suits were lodged, their status did not suffer from any defect. It is well-known that under O. 20, R. 14, Civil P. C., it is only when payment of the purchase money is made into Court together with the costs if any decreed against the plaintiff that the defendant vendee is required to deliver possession of the property and the title of the pre-emptor is deemed to have accrued from the date of such payment. In this connection reference may be made to 44 Cal. 675,⁶ where at page 685 their Lordships of the Privy Council have observed :

"A person claiming an order of pre-emption cannot be regarded in the same light as an ordinary purchaser of an estate. His right is, when an estate has been sold, to acquire the property from the purchaser at the price paid. . . . If the claim be disputed and a suit must be brought, the rights of the parties are regulated by the Code of Civil Procedure."

b In the present case, the plaintiffs having been defeated in their attempt to deprive the vendees of the major portion of the property acquired by them, the dispute qua the parcel of land occupied by the plaintiffs as occupancy tenants will be between occupancy tenants on the one side and owners of the estate on the other, and this being so, the owners of the estate would be preferred to the occupancy tenants. This view is supported by a Division Bench judgment of this Court reported in A.I.R. 1939 Lah. 77.⁷ It is noteworthy that the dissenting judgment of Rattigan J., relied upon by the learned Judges in this case was relied upon by the respondents before their Lordships of the Privy Council in a case reported in 54 All. 189,⁸ and was not adversely commented upon by them. The question c that was raised by the plaintiffs in this case as to the market value of the land need not be discussed, as counsel for the appellants has made a statement at the Bar that he does not dispute the sale-price mentioned in the sale deeds, and it is only when the parties are not agreed as to the price that the Court is empowered to determine whether the price was fixed in good faith or paid and, if not so fixed or paid, to fix the market value of the property in question (S. 25 (1) of the Pre-emption Act). I would therefore, dismiss Regular First Appeals Nos. 430 and 431 of 1938 also, and maintain the decision of the trial Court. I would further direct that the appellants should pay the costs of the respondents in all the appeals. In Appeal No. 66 of 1939, I would also grant a certificate that the case involves a substantial question of law as to the interpretation of d the Government of India Act, 1935 as well as of the Order-in-Council made thereunder.

TEK CHAND J. — I agree in the conclusions reached by my learned brother on all points arising in these appeals and the reasons given by him in his exhaustive judgment, and have to add a few words in regard to one matter only, viz., the validity of the exchange of occupancy rights in reference to the provisions of the Punjab Alienation of Land Act. Varyam and Nizam resided in mauza Jagmalera in Hissar District, and were occupancy

tenants of agricultural land in that village. On 1st June 1937 they exchanged these occupancy rights e for occupancy rights in agricultural land held by Madan Chand and Champa Lal in another village named Chachalkoti. Varyam and Nizam are Jats, which is one of the "agricultural tribes" notified under the Punjab Alienation of Land Act, in Hissar District. Madan Chand and Champa Lal are Mahajans of Chura in Dikaner State. They hold agricultural land in Hissar District but their tribe is not among the tribes notified under the Act. It is contended on behalf of the appellants that the exchange offended against the provisions of the Punjab Alienation of Land Act and could not take effect as such. In reply, it is maintained by the respondents that the provisions of that Act prohibiting alienations, other than sales and mortgages, by members of notified agricultural tribes in favour f of persons who are not members of such tribes had been rendered void by S. 293, Government of India Act, 1935, (25 and 26 Geo. V. C. 42), which had come into force on 1st April 1937, and had no legal validity on 1st June 1937, when the exchange in question was effected. The question raised is of great importance and I shall examine it in some detail.

The Punjab Alienation of Land Act was enacted by the Indian Legislative Council in 1900 "with a view to amend the law relating to agricultural land in the Punjab". In sub-s. (3) of S. 2 of the Act the expression "land" is given a much wider meaning than it ordinarily possesses. It is defined as meaning "land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture and includes : (a) the sites of building and other structure on such land; g (b) a share of profits of an estate or holding; (c) any dues or any fixed percentage of land revenue payable by an inferior land owner to a superior land owner; (d) a right to receive rent; (e) any right to water engaged by the owner or occupier of land as such ; and (f) any right of occupancy."

In sub-s. (4) of S. 2 the expression "permanent alienation" is defined as including "sales, exchanges, gifts, wills and grants of occupancy rights." Section 4 empowers the Provincial Government to determine by notification in the official Gazette "what bodies of persons in any district or group of districts are to be deemed to be agricultural tribes or groups of agricultural tribes for the purposes of this Act."

Section 3 of the Act deals with permanent alienation of land. It permits a member of an agricultural tribe to freely alienate land in favour of a h member of the same tribe or of a tribe in the same group, but it lays down that (except in certain cases which are not material for the purposes of this case) a permanent alienation by a member of an agricultural tribe in favour of a person who is not a member of the same tribe, or a tribe in the same group, shall not take effect as such, unless and until sanction is given thereto by the Deputy Commissioner. Sections 6 to 10 permit mortgages of agricultural land by members of agricultural tribes in favour of persons who do not belong to such tribes in certain forms and for specified periods only. Section 11 contains similar prohibition against leases for a term exceeding 20 years and S. 15 against alienating, or charging the produce of land for more than one year. In exercise of the powers conferred on the Provincial Government by S. 4, it has issued notifications, the most important of which is No. 63, dated 18th April 1904, to which additions have been made from time to time. By this notification

6. (16) 3 AIR 1916 P. C. 179; 39 I. C. 958; 44 Cal. 675; 44 I. A. 80 (P.C.), Deonandan Prashad Singh v. Ramdhari Chowdhri.

7. (39) 26 AIR 1939 Lah. 77 : 183 I. C. 721; ILR (1939) Lah. 164; 41 P.L.R. 348, Kewal Krishan v. Jain Brotherhood, Ludhiana.

8. (32) 19 AIR 1932 P. C. 57 : 136 I. C. 402 : 54 All. 189 : 59 I. A. 138 (P.C.), Hans Nath v. Ragho Prasad Singh.

the Provincial Government declared that "for the purposes of the said Act : (1) In each district of the Punjab mentioned in Col. 1 of the schedule annexed to this notification, all persons, either holding land or ordinarily residing in such district and belonging to any one of the tribes mentioned opposite the name of such district, in Col. 2, shall be deemed to be "agricultural tribe" within that district. (2) All the "agricultural tribes" within any one district shall be deemed to be a "group of agricultural tribes"."

By various other notifications certain other tribes have been notified as separate "groups of agricultural tribes." It will appear from the lists given in the schedules annexed to these notification that a tribe notified as "agricultural" in some districts is not so notified in others. It will also be seen that in some area certain specified got, constituting a particular tribe, are notified, while the other got of the same tribe are not. The selection is based (except in a few cases which I shall mention presently) on "descent" alone; all persons born in the tribes or got of tribes; mentioned and holding land or ordinarily residing in the areas named, are entitled to the benefits given, and are subject to the restrictions laid down, in the Act. In some cases, the selection is based on "religion alone." For instance, in Lyallpur, Gujranwala, Sheikhpura and the other Colony districts, Indian Christians, whether converts from Hinduism, Islam or Sikhism, and whether originally belonging to a tribe like the Jat or Rajput predominantly engaged in agricultural pursuits, or to a money-lending or trading class like the Khatri, Arora, Bania or Khoja, have been notified as a separate "group of agricultural tribes." The effect of these provisions in the Act is to prohibit, or restrict, permanent or temporary alienation of agricultural land by certain classes of His Majesty's subjects, and to debar other classes from acquiring such land from the former, on grounds of descent or religion.

As stated above, the Act was passed in 1900 by the Indian Legislature, which had been constituted under the Indian Councils Act 1861 (24 and 25 Vict. c. 67) as amended by the Indian Councils Act 1892 (55 and 56 Vict. c. 14). Under these statutes the Indian Legislature was empowered, subject to certain conditions and within certain limits, to legislate for all persons as well as all places in British India. But within these limits it had authority, "as plenary and as ample, as the Imperial Parliament in the plenitude of its power possesses or could bestow." (1884) 9 A. C. 117.⁹ As observed by their Lordships of the Privy Council in 4 Cal. 172,¹⁰ at pp. 180-1:

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament; but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of parliament itself."

The Indian Councils Act contained no provision prohibiting the Indian Legislature from passing discriminatory laws affecting property based on descent or religion and, therefore, in 1900 it was within its competence to enact the various provisions of the Punjab Alienation of Land Act. The

Indian Councils Act was replaced by the Government of India Act 1915 (5 and 6 Geo. V, c. 61). By S. 130 of that Act, all laws in force in British India on the date of the repeal were kept alive. Notwithstanding this repeal, therefore, the provisions of the Punjab Alienation of Land Act continued to be good law as before. The statute of 1915 was, in turn, superseded by the Government of India Act (24 and 25 Geo. V, Ch. 42) passed by Parliament in 1935, which (with the exception of Part 2 relating to Federation) came into force on 1st April 1937. Section 292 of this Act provided that "notwithstanding the repeal by this Act of the Government of India Act of 1915, but subject to the other provisions of this Act, all the laws in force in British India immediately before the commencement of Part 3 of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority." The effect of this section was to keep intact all the laws which were in force on 1st April 1937, unless those laws were repugnant to any other provision in the statute of 1935. One such provision was contained in S. 298, which declared that "(1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on an occupation, trade, business, or profession in British India. (2) Nothing in this section shall affect the operation of any law which—(a) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognized by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class."

As has been shown above, the Punjab Alienation of Land Act contained several provisions prohibiting certain classes of His Majesty's subjects domiciled in British India from acquiring and disposing of property on grounds of "descent" or "religion." These provisions of the Act therefore ceased to be operative, except to the extent to which they were saved by sub-s. (2). That sub-section exempted from the operation of the declaration in sub-s. (1) only so much of the existing law as prohibited sale or mortgage of agricultural land; the exemption did not extend to exchanges, gifts, wills or grants of occupancy rights which are included in the enlarged definition of "permanent alienation" as given in the Punjab Alienation of Land Act, nor to leases or alienation of, or charges on, produce of land. The effect of these provisions in the Government of India Act therefore is that on and after 1st April 1937, a person belonging to a notified agricultural tribe, is free to exchange gift, or bequeath agricultural land or grant occupancy rights in it to a person who does not belong to any of the agricultural tribes in the same group. Further, even with regard to sales and mortgages the provisions of the Alienation of Land Act, which are preserved by sub-s. (2) of S. 298, must now be restricted only to agricultural land as used in its ordinary sense (i. e. land which is used for purposes of agriculture or purposes subservient to agricultural) and not in the extended meaning given to it in S. 2 (3) of the Act. The Government of India Act does not contain any definition of "agricultural land;" the enlarged definition given in the Punjab Alienation of Land Act cannot, obviously, be referred to to interpret an Act of Parliament.

⁹ (1884) 9 A. C. 117; 53 L. J. P. C. 1: 50 L. T. 501; Archibald G. Hodges v. Queen.
¹⁰ (1884) 4 Cal. 172: 5 L. A. 173; 3 Sar. 324: 3 Cal. 172 (P. C.), *Empress v. Burah*.

Mr. Mehr Chand Mahajan, the learned counsel for the appellants, in the elaborate arguments which he addressed to us could not put forward any cogent reason in support of his contention. All that he urged was that it could not have been the intention of Parliament to keep intact laws like the Punjab Alienation of Land Act with regard to two forms of alienations only and to repeal them as regards others. He maintained that no reason existed for this distinction and suggested that the omission of 'exchange, gift, will or lease' in sub-s. (1) of S. 293, Government of India Act, was probably an oversight; it is a *casus omissus*, which should be supplied by the Courts taking the words 'sale or mortgage' in sub-s. (2) to be illustrative and not exhaustive. This is an argument which I am wholly unable to accept. In the first place, there is no reason to suppose that Parliament was unmindful of the fact that the Indian Laws (like the Punjab Land Alienation Act) which offended against the general rule which was being laid down in sub-s. (1) of S. 293, contained provisions prohibiting or restricting alienations other than sales or mortgages. Therefore, if these two forms of alienations alone were specifically mentioned in the saving clause, the others must be taken to have been excluded. The rule of construction applicable to such matters is expressed in the maxim *expressum facit cessare tacitum* (what is expressed makes what is not expressed to cease). Secondly, as pointed out by Lord Halsbury L. C. in his speech in the House of Lords in the well-known case in (1891) A.C. 531,¹¹ at p. 549 it is not "competent to any Court to proceed upon the assumption that the Legislature has made a mistake. Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and I think any other view of the mode in which one must approach the interpretation of a statute, would give authority for an interpretation of the language of an Act of Parliament, which would be attended with the most serious consequences." As to *casus omissus*, the rule of construction of statutes is thus summarized by Craies in his Statute Law (3rd Edn.) page 69 :

"The Judges may not wrest the language of Parliament even to avoid an obvious mischief. When an Act contains special saving of another Act, and omits all allusion to a third Act in *pari materia*, it is safer to presume that the omission is deliberate than that it is due to forgetfulness or made per incuriam (through want of care). Even if the omission flows from forgetfulness, those who claim the benefit of the Act, the reservation of which is omitted, cannot succeed: (1887) 36 Ch.D. 573,¹² at p. 582. The authorities on this subject are numerous and unanimous. No case can be found to authorize any Court to alter a word so as to produce a *casus omissus*, said Lord Halsbury in (1888) 13 A.C. 595,¹³ at p. 602. In 6 Moo. P.C. 1,¹⁴ at p. 9 the

Judicial Committee said: "We cannot aid the Legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there; in other words, the language of Acts of Parliament, and more especially of modern Acts, must neither be extended beyond its natural and proper limits, in order to supply omissions or defects, nor strained to meet the justice of an individual case." Even if it be assumed, therefore, that this is a *casus omissus*, "it is for others than the Courts to remedy the defect." 54 All. 1067,¹⁵ at p. 1076.

Mr. Mehr Chand Mahajan also referred to S. 293, Government of India Act. But that section has no bearing whatever on the point before us. The Government of India Act had re-constituted under different names the governments and authorities in India and had prescribed the distribution of executive and legislative powers between the Central Authority (Federation) and the Provinces. In order to adapt the existing laws to the provisions of the Act, it had become necessary to revise, alter and amend the phraseology of several provisions of the laws in force in British India or parts of British India. Instead of having these adaptations, alterations and amendments made by the Indian or Provincial Legislatures in the ordinary way, Parliament adopted the much simpler course of empowering His Majesty to promulgate an order in council embodying the necessary adaptations and modifications. Under the powers so given, His Majesty issued the Government of India (Adaptation of Laws) Order, 1937, and the schedules attached to this order contain the amendments made in numerous Indian Acts so as to bring them in conformity with the Government of India Act. Neither S. 293, nor the Order in Council, contains anything which keeps alive these parts of the Punjab Alienation of Land Act, which offend against the general rule laid down in sub-s. (1) of S. 293, and which are not expressly saved by sub-s. (2) of that section. It follows, therefore, that only those parts of the Punjab Alienation of Land Act are now in force in the Punjab, which relate to sales and mortgages of agricultural land and the remaining provisions of that Act prohibiting or restricting other forms of alienations, being repugnant to sub-s. (1) of S. 293, Government of India Act, 1935 and not being within the exception contained in sub-s. (2) of that section, are no longer law after 1st April 1937. As stated above, the exchange of occupancy rights in question by Varyam and Nizam in favour of the respondents was made on 1st June 1937, and it must, therefore, be held that it is not invalid and must be given effect to.

Before concluding, I think it necessary to refer to A.I.R. (1941) Lah. 27,¹⁶ decided by Skemp J. sitting in Single Bench, though no reference was made to it by either counsel in the course of the argument before us. In that case, the learned Judge came to the contrary conclusion, and in doing so he relied mainly upon a passage in the report of the "Joint Select Committee" of the two Houses of Parliament as showing that "Parliament had no objection to maintaining the 'general principle' of the Punjab Alienation of Land Act." This Committee consisting of 16 members of the House of Lords and 16 of the House of Commons had been appointed

11. (1891) 1891 A.C. 531: 61 L.J.Q.B. 265: 65 L.T. 621: 55 J.P. 805, Commissioners for Special Purposes of Income-tax v. John Frederick Pemsel.

12. (1887) 36 Ch. D. 573: 57 L. J. Ch. 264: 57 L.T. 756: 36 W. R. 34, In re Williams; Jones v. Williams.

13. (1888) 13 A.C. 595: 58 L.J.Q.B. 162: 59 L.T. 697: 37 W. R. 449: 6 Asp. M. C. 338, Mersey Docks and Harbour Board v. Henderson Bros.

14. (1846-51) 6 Moo. P.C. 1: 4 M. L. A. 179 (P.C.), Crawford v. Spooner.

15. ('38) 20 A. I. R. 1933 P.C. 63: 142 I.C. 7: 54 All. 1067: 80 I. A. 12 (P. C.), Hanaraj Gupta v. Official Liquidators of Dehra Dun, etc. Co.

16. ('41) 28 A.I.R. 1941 Lah. 27: 192 I.C. 308: 42 R. L. B. 628, Deputy Commissioner, Amritsar v. Babu Ralla Ram.

ed in 1933 to consider the "Future Government of India and, in particular to examine and report upon the proposals contained in Command Paper 4288" (commonly known as the White Paper). The Committee submitted its report in 1934 and it was some time later that a Bill was introduced in Parliament, which ultimately became the Government of India Act, 1935. This report is, no doubt, a document of great historical interest, but if I may say so with the utmost respect, it is not correct to assume that all that was said in the report represented the will of the Parliament as a whole. Further, it is well-settled that the proceedings or reports of such Committee cannot be referred to interpret the plain words of a statute. "It is unquestionably a rule," says Maxwell in his Interpretation of Statutes (Edn. 8, p.25); "that what may be called the parliamentary history of an enactment is not admissible to explain its meaning. Its language can be regarded only as the language of the three estates of the realm, and the meaning attached to it by its framers or individual members of one of those estates cannot control the construction of it. Indeed the inference to be drawn from comparing the language of the Act with the declared intention of its framers would be that the difference between the two was not accidental but intentional."

For a recent instance of the application of this rule, reference may be made to 1935 A.C. 445¹⁷ where their Lordships of the Privy Council held that the report of a Royal Commission (on a consideration of which a measure was introduced in Parliament which ultimately became law) was inadmissible to show the intention of the Act. The learned Judge in A.I.R. 1941 Lah. 271⁶ further observed that as sales and mortgages were the "main features of the Punjab Alienation of Land Act" and as they had been specifically exempted from the general declaration contained in sub-s. (1), S. 298 "all the provisions of the Punjab Act must be deemed to be in full force." With great respect, again, I venture to say, that this conclusion cannot follow from the premises. On the other hand, as I have shown above, the correct construction is such circumstances is that by limiting the exemption in subsection (2) to two specific forms of alienation the Legislature must be taken to have excluded the other forms from it. For all these reasons, the decision in A.I.R. 1941 Lah. 271⁶ cannot be accepted as correct.

I may also mention, that the conclusion at which we have reached is in accord with the opinion expressed by Dalip Singh J. while delivering the main judgment of the Full Bench in A.I.R. 1941 Lah. 182¹⁸ at p. 186. The learned Judge after an examination of the relevant provisions of the Government of India Act, held that the "saving clause (sub-s. (2) of s. 298) can only save sales and mortgages and nothing else in the impugned Act." The other members of the Bench, however, preferred not to express any opinion as this particular question was not directly involved in the case before them. I agree with my learned brother that all these appeals fail and must be dismissed with costs. I also agree that certificate under S. 205, Government of India Act, be granted to the appellants.

G.N.R.K.

Appeals dismissed.

17. (1935) 1935 A.C. 445, Assam Railways and Trading Co. Ltd. v. C. I. Railway.

18. (41) 28 A.I.R. 1941 Lah. 182 : 195 I.C. 17 : 43 P.L.R. 198 (F.B.), Punjab Province v. Daulat Singh.

A. I. R. (29) 1942 Lahore 252

DALIP SINGH AND SALE JJ.

Firm Shaw Hari Dial and Sons, Madras through H. R. Bagdy — Appellant

v.

Sohna Mal Beli Ram through Arjan Das — Respondents.

Letters Patent Appeal No. 68 of 1941, Decided on 24th March 1942, from judgment of Monroe J., in F. A. O. No. 158 of 1940, D/- 30th January 1941.

Civil P. C. (1908), S. 20 — Contract of purchase of goods—Owner consignor and consignee — Consignment at owner's risk — Place of delivery is to which goods are sent.

Where the goods are sent by the railway and the owner of the goods is the consignor and the consignee both and the goods are sent at owner's risk, the place of delivery shall be place to which the goods are sent. [P 252 C 2]

C. P. C. —

('40) Chitaley, S. 20, N. 18, Pt. 6.

('41) Mulla, Page 120, Pt. (e).

Darbari Lal Khanna — for Appellant.

J. L. Kapur for J. N. Aggarwal —

for Respondents.

DALIP SINGH J. — The only point arising in this appeal now when it has come back from the Full Bench* on the decision of the preliminary question is whether the Court at Akalgarh, Gujranwala District, had jurisdiction to entertain the suit or whether the trial Court was right in returning the plaint to the plaintiff for presentation to the proper Court. This was a contract re: purchase of certain goods. Hence to decide the above question three points arose; one was the place of the contract; second was the question of delivery of the goods; and the third was the question of payment of the goods. The learned trial Court decided all three points in favour of the defendants and hence returned the plaint. On appeal the learned Judge in Single Bench held the first point in favour of the defendants agreeing with the trial Court. No more need be said about this point. As regards delivery, the learned Judge in Single Bench came to no finding at all. I find, however, that the goods were sent by the railway, the consignor and the consignee were both the plaintiff and the goods were sent at owner's risk. Apart, therefore, from the oral evidence of Barkat Ram, which was accepted, on the question of the location of the contract, that oral evidence is confirmed by the plaintiff's own statement as well as by Barkat Ram's statement that the railway receipts were so sent. This clearly shows that delivery was to be made at Madras.

As regards the third point, the question is where were payments to be made. The learned Judge in Single Bench merely referred to certain circumstances without discussing the oral evidence on the subject and was in error in stating that it was not suggested that there was any express agreement for payment in Madras. As a matter of fact, this was pleaded and there is the oral evidence both of Barkat Ram and Bagdy that payments were to be made in Madras. It is difficult to see why the evidence of Barkat Ram should be accepted on the subject of the location of the contract and the place of delivery but should be rejected on the question of

*See (42) 29 A.I.R. 1942 Lah. 95 (F.B.).

a the place of the payment. I see no reason either intrinsic or extrinsic why this should be so. I would, therefore, accept this appeal and restore the order of the trial Court returning the plaint to the plaintiff for presentation to the proper Court. The defendant-appellants are entitled to their costs throughout.

SALE J.—I agree.

R.K. ————— *Appeal accepted.*

*** A. I. R. (29) 1942 Lahore 253**

BLACKER AND BHIDE JJ.

Bhai Lal Chand and others — Petitioners v. Emperor.

Criminal Misc. Nos. 139, 151 and 177 of 1942, b Decided on 23rd June 1942, from reference made by Bhide J., D/- 1st May 1942.

"(a) Penal Code (1860), S. 384 — Creditor filing false complaints against debtor with object of realising his debts—No offence of extortion is committed.

No doubt institution of false criminal complaints would amount to putting a person in fear of injury within the meaning of S. 384, but if the object is merely to realise debts which were admittedly due, the second ingredient of the offence, namely, "dishonesty" is not established and the act does not amount to extortion. [P 254 C 1]

Penal Code—

(38) Ratanlal, Page 937 Pt. 10.

(38) Gour, Page 1294 Para. 4504.

c (b) Interpretation of Statutes—Two meanings possible — Penal provisions must be construed favourably to the subject.

It is one of the canons of the construction of a penal statute that where two meanings are possible, that which is more favourable to the subject is to be taken. [P 254 C 1]

Sardar Gopal Singh — for Petitioners.

Basant Krishen, Assistant to Advocate-General — for Respondents.

ORDER OF REFERENCE

BHIDE J.—Criminal Miscellaneous Nos. 139, 151 and 177 of 1942 are connected and will be disposed of together. The petitioners are being prosecuted under S. 384 read with S. 109 and S. 511, Penal Code, the charges being extortion, abetment of extortion or attempt to extort. The cases have been pending in the Mianwali District. The petitioners have applied for the transfer of the cases and have also prayed for the proceedings being quashed under S. 561A, Criminal P. C., on the ground that even on the facts alleged by the prosecution no case under S. 384, Penal Code, is disclosed. The latter point has been argued at some length and after considering the matter it seems to me that there is force in the contention of the petitioners. But as the matter is not covered by any direct authority and is not free from difficulty, I consider it desirable that these cases should be placed before a Division Bench. The charges against the petitioners are that they caused false criminal complaints to be instituted against certain debtors in order to bring pressure on them to pay their debts. It is not alleged that the petitioners were trying to obtain more money than was due to them, but the prosecution alleges that they were attempting to realize their money by unlawful methods and therefore their acts came within the purview of S. 384, Penal

Code. The learned counsel for the petitioners has urged that the facts alleged do not constitute any offence under S. 384, Penal Code, because there was no 'dishonest' intention. "Extortion" is defined in S. 383, Penal Code, as follows :

"Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'extortion'."

It is not disputed that institution of false criminal complaints would amount to putting a person in fear of injury within the meaning of the section, but it is contended that in the present cases the object being merely to realise debts which were admittedly due, the second ingredient of the offence, namely, "dishonesty," is not established. The word "dishonestly" is defined in S. 24, Penal Code as follows :

"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'."

"Wrongful gain" and "wrongful loss" are defined in Section 23 :

"'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled."

In the present cases, according to the prosecution the petitioners tried to obtain "wrongful gain" inasmuch as they wanted to realize their debts by instituting false criminal complaints. The institution of false criminal complaints would no doubt come under the category of unlawful means but it seems doubtful whether the other part of the definition of "wrongful gain" can be said to be applicable to the facts of the present cases as the petitioners were legally entitled to realize the debts. The learned counsel for the Crown urged that although debts may have been due, the petitioners were not entitled to any particular money lying with the debtors and their only remedy to realize the debts was by instituting civil suits. No authority directly in point was cited but it seems to me that the petitioners can hardly be said to have committed or attempted to commit "extortion" within the definition of the term in S. 383, Penal Code. The real offence of the petitioners would, I think, fall under S. 211, Penal Code, (read with Ss. 109 and 511, Penal Code), but cognizance of such an offence could not be taken except on the complaint of the Court concerned under S. 195, Criminal P. C. It seems useless in the circumstances to allow the proceedings to go on until it is decided whether S. 384, Penal Code, can be said to be at all applicable to the circumstances of these cases. I accordingly suggest that these applications may be placed before a Division Bench with the permission of the Hon'ble Chief Justice.

ORDER OF DIVISION BENCH

BLACKER J. — The question which has been referred to this Bench is whether in these three cases on the facts alleged *prima facie* offences under Ss. 384/511/109, Penal Code, have been made out. For this purpose it must naturally be assumed that the prosecution will succeed in establishing the truth of the allegations in the reports submitted with the three charge sheets. In one case that in which it is alleged that a false complaint was made by the accused under S. 498, Penal Code, against Nazu son of Zaman, there appears to me to be no difficulty in answering the question. It is stated that Zaman's debt had been cancelled by the Debt Conciliation

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TEK CHAND AND BECKETT JJ.

Kalian Dass—Decree-holder—Appellant

v.

*Mirza Jaffar Beg and others —
Judgment-debtors — Respondents.*

Exn. First Appeal No. 93 of 1941, Decided on 10th March 1942, from order of Senior Sub-Judge, Multan, D/- 13th March 1941.

Punjab Relief of Indebtedness Act (7 of 1934, as amended in 1940), S. 30 (1)—“Suits brought after commencement of this Act” — This Act means Act of 1934 and not amending Act of 1940—Suit in 1936 in respect of debt of 1923 decreed — S. 30 (1) applies and application f under S. 30 (3) is competent.

Sub-section (1) of S. 30 as amended in 1940 is now a part of the Relief of Indebtedness Act and the effect of its incorporation in the Act is that the words “commencement of this Act” mean commencement of the Act of 1934. It cannot possibly mean the commencement of the amending Act. This interpretation no doubt affects decrees passed in suits instituted between 8th April 1935 (when the original Act came into force) and 5th October 1940; but the amending Act is professedly retrospective and the Legislature clearly intended a revision of pre-existing decrees which had been passed in respect of debts (as defined in the Act) advanced before 8th April 1935 but which had not been completely executed before the coming into operation of the amending Act. Therefore where a debt in respect of which a decree has been passed had been advanced in 1923 and the suit had been brought in 1936, the debt is covered by sub-s. (1) of S. 30 as amended and the judgment-debtor is entitled to file an application under S. 30 (3). [P 255 C 1]

Q. C. Mital — for Appellant.

TEK CHAND J. — On 14th February 1936 the appellant instituted a suit against the respondents for recovery of a certain sum of money due on foot of a mortgage, which had been effected on 15th February 1923. A preliminary decree in terms of O. 34, R. 4, Civil P. C., was passed on 15th February 1938 and it was made final on 17th August 1938. In execution of the decree, the mortgaged property was sold but the sale proceeds were found to be insufficient to discharge the decree. The decree-holder thereupon applied under O. 34, R. 6, Civil P. C., for a personal decree for the balance against the respondents and on 3rd October 1940 a personal decree was passed.

Two days later, on 5th October 1940, (Punjab) Act, 12 of 1940 came into force, whereby S. 30, Punjab Relief of Indebtedness Act, 1934, was amended. On 9th December 1940 the judgment-debtors made an application under sub-s. (3) of S. 30 (as amended), pointing out that the decree of 3rd October 1940 contravened sub-s. (1) of the section (as amended), as the amount of the decree was more than twice the amount of the sum which had been actually advanced in respect of the debt, and praying that the decree be set aside, transaction re-opened and the decree be brought in conformity with (amended) sub-section (1). The Subordinate Judge has held that this application is competent and directed the transaction to be re-opened. The decree holder has appealed and it has been contended on his behalf that the sum in which the decree was passed,

a Board, and if this is true, it was no longer legally due. It will, of course, be a matter for inference from the proved facts whether the intention was to induce the delivery of any property, but the natural presumption is that the “debt” would be discharged by the delivery of money or some other property. As in this case the accused were not “legally entitled” to get such property, there would *prima facie* be a dishonest intention within the meaning of the section, though the appropriate section would seem to be 385 rather than 384/109. Reference is made in this charge sheet to another complaint under S. 380, Penal Code, against the same Nazu. The facts are not quite clear, but if that was also a false complaint made with the same intention and the debt had already been cancelled, another *prima facie* offence of attempted extortion would appear to be made out.

b In the cases to which the other two charge sheets refer the question is not so easy to answer. The answer depends on the correct construction of the words “legally entitled” in S. 23, Penal Code. A possible construction of the phrase “property to which a person is legally entitled” is that it means property of which the legal title of ownership vests in that person at the material time. For instance if I have Rs. 100 on me which I have acquired lawfully, that is property of which I am at the time the possessor of the legal title, even though I may owe that very sum to my creditor. Conversely it is not property to which any legal title vests in him. If this is the correct construction, it would be no answer for the accused in these cases to say that they were not seeking to get any specific piece of property, but merely to get their debts settled. It is, as I have said above, the natural presumption that the debt would be settled by the delivery of some property and perforce until that property was delivered to my creditor the legal title to it would continue to vest in me. Another construction however is clearly possible, and I think it is probably the more natural construction. It is that the words are used in their more ordinary meaning as referring to property which the person is entitled to get, or to retain as the case may be. For instance a legatee is “legally entitled” to get his legacy, and an executor is not “legally entitled” to keep it. Similarly, a creditor and in particular, a decree-holder, is legally entitled to the amount of the debt, or the decretal amount, and the debtor is not legally entitled to withhold it. Not only does this seem to me to be a more natural interpretation, but it is one of the canons of the construction of a penal statute that where two meanings are possible, that which is more favourable to the subject is to be taken. In this view of the case the inducement to deliver property would not be with the intention of causing wrongful gain or wrongful loss and would therefore not be dishonest within the meaning of S. 383, Penal Code, read with Ss. 24 and 23.

In my judgment, therefore, the answer with respect to these other two cases must be that just as it is not an offence to deceive a person simpliciter, so it is no offence to put a person in fear of an injury, unless it is done with a criminal intention. As such an intention is absent in these two cases there is no act falling within the definition of extortion, or attempted extortion. I do not think this Bench is required to express any opinion whether there is any offence under either S. 211, Penal Code, or under S. 383, Penal Code.

TEK CHAND J. — I agree.

BECKETT J.

Reference answered

a having been instituted in February 1936 and Act 12 of 1940 having come into force on 5th October 1940 the present case is not governed by the amended sub-s. (1) of S. 30, as it applies to "suits brought after the commencement of this Act in respect of a debt advanced before the commencement of the Act." This contention is based on a misreading of the section and is clearly erroneous. Section 14 of Act 12 of 1940 repealed sub-s. (1) of S. 30, as originally enacted in 1934, and for it substituted the following:

"(1) In any suit brought after the commencement of this Act in respect of a debt as defined in S. 7 advanced before the commencement of this Act, no Court shall pass or execute a decree or give effect to an award in respect of such debt for a larger sum than twice the amount of the sum found by the Court to have been actually advanced, less any amount already received by a creditor in excess of the amount due to him under cl. (e) of sub-s. (2) of S. 3, Usurious Loans Act, 1918."

b This sub-section is now a part of the Relief of Indebtedness Act and the effect of its incorporation in the Act is that the words "commencement of this Act" mean commencement of the Act of 1934. It is quite clear from the context that it cannot possibly mean the commencement of the amending Act. This interpretation no doubt affects decrees passed in suits instituted between 8th April 1935 (when the original Act came into force) and 5th October 1940; but the amending Act is professedly retrospective and the Legislature clearly intended a revision of pre-existing decrees which had been passed in respect of debts (as defined in the Act) advanced before 8th April 1935 but which had not been completely executed before the coming into operation of the amending Act.

c The debt in respect of which the decree in this case was passed had been advanced in 1923 and the suit had been brought on 14th February 1936. It is therefore covered by sub-s. (1) of S. 30, as amended and under the law as it now stands the decree-holder is not entitled to execute it for more than twice the amount of the sum originally advanced, less any amount already received by him in excess of the amount due to him under cl. (e), sub-s. (2), S. 3, Usurious Loans Act, 1918. Under the amended sub-s. (3) of S. 30 the judgment-debtors were entitled to apply to the Court within six months from the date on which the amending Act came into force, i. e., 5th October 1940, to have the decree set aside, the transaction reopened and such orders passed as may be in conformity with the provisions of sub-s. (1). The application of 19th December 1940 is, therefore, competent. The appeal fails and is dismissed. There will be no order as to costs, as the respondents did not appear.

K.S./R.K.

*Appeal dismissed.***A. I. R. (29) 1942 Lahore 255****YOUNG C. J. AND BECKETT J.***Arjan Singh and another — Convicts
Appellants*

v.

Emperor.

Criminal Appeal No. 1805 of 1940, Decided on 27th November 1941, from order of Addl. Sessions Judge, Ferozepore, D/- 17th October 1940.

Penal Code (1860), S. 300, second and third clauses — Words "sufficient in the ordinary

course of nature" in third clause of S. 300 — Applicability.— Person knowingly causing injuries more likely to cause death than not in ordinary way — Offence falls either under second or third clause of S. 300 — Person dying of "merciless beating" — Offence is murder.

It is incorrect to say that the words "sufficient in the ordinary course of the nature" in the third clause of S. 300 can only be applied when death must be an almost certain result. If a person knowingly causes injuries which are more likely to cause death than not in the ordinary way, his offence falls under either the second or third clause of S. 300. When a person dies as a result of what is usually called a "merciless beating" the offence is one of murder. [P 256 C 1]

Penal Code —

('36) Ratanlal, Page 716 Pt. 1.

('36) Gour, Page 986 Pt. 3.

J. G. Sethi — for Appellants.

A. G. Maurice for Advocate-General —

for the Crown.

BECKETT J.—Arjan Singh and Bishan Singh have been found guilty of culpable homicide in respect of the death of Kapur Singh at the village of Maddoke in the Ferozepore District on 7th October 1939 and have been sentenced to transportation for life. According to the prosecution, there was previous enmity between Kapur Singh and Bishan Singh. Bishan Singh had killed an uncle of Kapur Singh some years before and more recently Kapur Singh had attacked Bishan Singh, but had escaped punishment. Arjan Singh is a brother of Bishan Singh. On the morning of the occurrence Kapur Singh had gone out at about day-break or soon after to cut charri in his field. The accused, who were in an adjoining charri field, came up armed with hatchets and beat him to death using the blunt side of the hatchets. The medical evidence shows that Kapur Singh had no less than 27 contused wounds on the head and other parts of the body, six bones being broken in his legs and arms on both sides.

Kapur Singh lived for a short time afterwards and was able to make a report to the police, in which both Bishan Singh and Arjan Singh are named as his assailants. He was then taken to hospital, but died immediately afterwards, at about noon the same day. Besides the statement of the deceased himself, we have the evidence of three eye-witnesses. Rur Singh might have a reason for deposing falsely against Bishan Singh but the same cannot be said about the other two witnesses, Dauli and Dewana. They are owners of fields in the vicinity, who would have a reason for being near the scene of the occurrence and there are no discrepancies of any importance in their account of what took place. The main argument for the defence is that there may always be a tendency to implicate two brothers even though one of them may be guilty; but none of the witnesses had any reason for deposing falsely against Arjan Singh and the injuries afford some indication that there were two assailants. There can be no doubt that both the accused have been properly convicted and their appeals must be dismissed.

There is a petition for revision asking that the accused should be found guilty of the full offence of murder. There is considerable force in this petition. The medical evidence indicates that Kapur Singh had a chance of surviving his injuries, although he was more likely than not to die as a result of them. In convicting under the lesser charge the learned Sessions Judge has held that the words "sufficient

in the ordinary course of nature' in cl. 3 of S. 300, Penal Code, can only be applied when death must be an almost certain result. In our opinion this is a legal error. If a person knowingly causes injuries which are more likely to cause death than not in the ordinary way, his offence falls under either cl. (2) or cl. (3) of S. 300. In fact, the learned Sessions Judge has himself remarked that the injuries were likely to cause death, and he appears to have overlooked clause (2) of the section, in which these very words are used. The question is one which comes up in a large number of cases and it seems necessary to affirm the principle that when a person dies as a result of what is usually called a "merciless beating" the offence is one of murder. The point is of importance, since there may be a tendency for persons taking revenge on their enemies to cause death by means of a number of blows, none of which would be sufficient to cause death alone, in the hope of avoiding the full legal consequences of their act. In the present case, however, there have been a number of unfortunate delays, which were possibly unavoidable, but which had the effect of delaying the proceedings for more than two years. In these circumstances we do not think that it would be possible to alter the sentence now and this makes it unnecessary to interfere in revision. The petition is accordingly dismissed.

G.N./R.K.

*Petition dismissed.***A. I. R. (29) 1942 Lahore 256**

YOUNG C. J. AND SALE J.

Kehr Singh — Accused — Petitioner

v.

Mt. Kirpal Kaur — Complainant — Respondent.

Criminal Revn. Petn. No. 715 of 1941, Decided on 24th April 1942, for revision of order of Sess. Judge, Ludhiana, D/- 3rd April 1941.

(a) Criminal P. C. (1898), S. 156 (3) — S. 156 (3) applies only to stage before issue of process.

Section 156 (3) applies only to the stage before the issue of process and cannot apply to a case in which the Magistrate has already issued process and summoned the accused; this is obvious from a consideration of S. 156 itself and the reference in S. 156 (3) to a Magistrate empowered under S. 190 which deals with the initiation of proceedings alone: ('40) 27 A. I. R. 1940 Sind 215, *Rel. on.*

[P 256 C 2; P 257 C 1]

Cr. P. C. —

('41) Chitale, S. 156 N. 5; S. 202 N. 18 Pt. 4,
(41) Mitra, Page 471 N. 487.

(b) Criminal P. C. (1898), S. 344, Ch. 21 and S. 156 (3)—Scope of S. 344 explained—Process issued — Magistrate must in warrant case proceed in accordance with Ch. 21—Order directing investigation under S. 156 (3) and adjourning hearing *sine die* is illegal.

After the issue of process the Magistrate must in a warrant case proceed in accordance with Ch. 21 of S. 252 and the following sections which are mandatory and which provide that the Magistrate shall proceed to hear the evidence. The only provision in the Criminal Procedure Code which allows an adjournment is contained in S. 344. There is no warrant in the Criminal Procedure Code for adjourning the hearing *sine die*. It would no doubt be open under S. 344 to the Magistrate to adjourn the

inquiry to a given date for any reasonable cause which might no doubt cover a case in which he considers that the complainant should be given an opportunity to collect evidence; but under such circumstances it would be for the complainant to take such action and not for the Magistrate to direct the complainant to go to the police or to direct the police to start a separate investigation. An adjournment for such a purpose should however only be sparingly granted, and would not affect the Magistrate's duty to proceed with the hearing according to law, after the adjournment. An order after the issue of process directing investigation under S. 156 (3) and adjourning the hearing *sine die* is therefore illegal. [P 257 C 1]

Cr. P. C.—

('41) Chitale, S. 251 N. 4; S. 344 N. 4 Pt. 1.

('41) Mitra, Page 903 N. 821; Page 1139 N. 987.

J. G. Sethi — for Petitioner.

Ajit Ram — for Respondent.

YOUNG C. J.—A complaint was made under Ss. 420, 409 and 467, Penal Code, against Kehr Singh by his brother's widow. The learned Magistrate before whom the case came up for hearing thinking that a case had been made out only under S. 403 sent it to a second class Magistrate for disposal. The second class Magistrate issued process and summoned the accused. Subsequently on revision the District Magistrate directed that the case should be heard by a first class Magistrate. The First Class Magistrate dispensed with the attendance of the accused on 9th September 1940. Thereafter there were about nine hearings in which evidence was taken on behalf of the complainant in the presence of counsel for the accused. On 30th January 1941 an application was made to the learned Magistrate by the complainant stating that it was a complicated case and she requested the Magistrate to refer the case to the police for investigation. The Magistrate without notice to the accused and *ex parte* passed the following order on 11th February 1941:

"It is revealed that the evidence in these complaints would be cumbersome, lengthy. . . . For a proper collection of all necessary evidence a thorough investigation of the case would be necessary. I therefore deem it quite desirable that the case be investigated by the police under S. 156 (3), Criminal P. C. Will the S. P. please depute a competent officer to take up the investigation in this case."

It appears that on receipt of this order the police deeming it an instruction from the Magistrate registered a case against Kehr Singh accused and proceeded to investigate. Against this order the accused filed an application in revision to the Sessions Judge who rejected it. He filed another application in revision to this Court which was heard by a learned Judge in Chambers who considered the matter to be of sufficient importance to refer it to a Division Bench. It is necessary to emphasise at this stage that there are therefore pending against the accused both a part-heard enquiry under Chap. 21, Criminal P. C., and also on the same facts a case which is apparently to be presented as a *chalan*.

It appears to us that the learned first class Magistrate has misdirected himself in law in issuing the order complained of. Section 156 (3), Criminal P. C., obviously applies only to the stage before the issue of process and cannot apply to a case in which the Magistrate has already issued process and summoned the accused; this is obvious from a consideration of S. 156 itself and the reference in S. 156 (3) to a Magistrate empowered under S. 190 which

a section deals with the initiation of proceedings alone. We are confirmed in this view by a Division Bench ruling of the Sind Court reported in A. I. R. 1940 Sind 215.¹ Again the process having been issued, the Magistrate must proceed in accordance with Chap. 21, S. 252 and the following sections which are mandatory and which provide that the Magistrate shall proceed to hear the evidence. The only provision in the Criminal Procedure Code which allows an adjournment is contained in S. 344 which the Magistrate has not used in the present case. What he seems to have done, is to have adjourned the hearing sine die—a procedure for which there is no warrant in the Criminal Procedure Code. It would no doubt be open under S. 344 to the Magistrate to adjourn the enquiry to a given date for any reasonable cause which might no doubt cover a case in which he considers that the complainant should be given an opportunity to collect evidence; but under such circumstances it would be for the complainant to take such action and not for the Magistrate to direct the complainant to go to the police or to direct the police to start a separate investigation. An adjournment for such a purpose should however only be sparingly granted, and would not affect the Magistrate's duty to proceed with the hearing according to law, after the adjournment.

For these reasons we hold that the order of the Magistrate in this case directing police investigation under S. 156 (3), Criminal P. C., was without jurisdiction and must be quashed. It will now be for the Magistrate to proceed with the case in accordance with the provisions of Chap. 21, Criminal P. C., and decide it as rapidly as possible, especially having regard to the fact that there have already been a number of hearings. The Magistrate will now proceed under the provisions of sub-s. (2) of S. 252 to ascertain what remaining witnesses the complainant wishes to produce and shall summon such of these witnesses before him to give evidence as he thinks necessary. With these directions the case is returned to the Magistrate for procedure according to law.

G.N./R.K.

Order quashed.

1. ('40) 27 A. I. R. 1940 Sind 215 : 191 I. C. 400 : 42 Cr.L.J. 162 : I. L. R. 1942 Kar. 481, Shahdad Gadal v. Emperor.

A. I. R. (29) 1942 Lahore 257 SPECIAL BENCH

a SKEMP, BHIDE AND DIN MOHAMMAD JJ.

L. Puran Chand, Proprietor, Dalhousie Dairy Farm — Petitioner

v.

Emperor.

Civil Ref. No. 2 of 1941, Decided on 4th June 1941, referred by Financial Commissioner, Punjab, D/- 11th February 1941.

(a) Stamp Act (1899), S. 33—Defendant filing receipts A and B — A not tendered in evidence — On 10th June 1938 Court writing on receipt A "Returned not proved"—On 30th August Court pronouncing judgment and orally directing receipt A to be impounded — Order through mistake written on receipt B and signed by Judge — Subsequently on mistake being brought to its notice Court on 3rd April 1939 writing endorsement on receipt A that it was impounded—Collector holding receipt to be conveyance ordering

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defendant to pay deficiency and penalty — On revision Commissioner enhancing penalty — Matter coming before Financial Commissioner as Chief Controlling Revenue Authority under S. 56(1) of Act — Financial Commissioner referring matter to High Court under S. 57 of Act—Impounding when takes place, explained — Receipt B held impounded and not receipt A — Court having become functus officio on 30th August 1938 held could not impound receipt A on 3rd April 1939 — Matter held could not be said to have come before revenue authorities in performance of their functions within S. 33 (Per Special Bench).

In a suit the defendant had filed two receipts A and B. Receipt A was attached to the written statement but was not tendered or produced in evidence. During the trial on 10th June 1938 the Court wrote on receipt A an endorsement "Returned, not proved" but it was not taken off but remained on the record. On 30th August 1938 the Court pronounced judgment and the same day directed that the receipt A be impounded. This direction was oral and the Ahimad by mistake wrote the order on the other receipt B for Rs. 13,500, the order being signed by the Sub-Judge and dated 30th August 1938. The following day it was sent to the Collector as provided in S. 38 (1), Stamp Act. On 24th March the Collector signed an order to the effect that as the right document had not been impounded by the Sub-Judge, no action could be taken by Collector and the receipt B was returned. On 3rd April 1939 the Sub-Judge wrote an endorsement on receipt A that the document was impounded, and the Collector thereupon holding the receipt to be a conveyance ordered the defendant to pay the deficiency and the penalty. The defendant took the matter in revision before the Commissioner who enhanced the penalty. The matter ultimately came before the Financial Commissioner, as Chief Controlling Revenue Authority under S. 56 (1) of the Act who referred it to the High Court under S. 57 of the Act :

Held that (1) the "impounding" of a document should be held to take place not when a verbal order was given by the Court but when it was carried out that is when the document was taken into custody by the Court and an endorsement was made thereon. Consequently, although the Court intended to impound receipt A the effect of the actual endorsement signed by it on receipt B was to impound receipt B. Therefore the receipt A was not impounded at all; [P 260 C 1]

(2) When the trial finished on 30th August 1938 the endorsement on receipt A made on 3rd April 1939 did not rectify the original error as the Court was clearly functus officio and therefore had no power to impound a document : 181 P. L. R. 1906 (F.B.) and ('80) 17 A. I. R. 1930 Bom. 392 (F.B.), Rel. on.; [P 260 C 2; P 260 C 1]

(3) Only the proceedings before the civil Court came within S. 33 and not the subsequent proceedings before the Collector, the Commissioner and the Chief Revenue Authority. Since the Court had no jurisdiction to impound the document receipt A the document could not be sent to the Collector at all and therefore the document could not in such a case properly come either before the Collector or the higher revenue authorities in the exercise of their functions and consequently they were not competent to impound it. [P 260 C 1, 2]

(b) Stamp Act (1899), S. 57(1)—Words "such case" in S. 57(1)—Meaning of (Per Special Bench),

a The words "such case" in S. 57 (1) refer to the questions propounded by the Financial Commissioner on which he felt doubt and not questions which he finally answered. The High Court therefore on a reference under S. 57 (1) will refuse to go into the questions which were finally answered by the Financial Commissioner. [P 259 C 1]

(c) Interpretation of statutes — Language of statute in ordinary meaning leading to manifest absurdity, hardship or injustice—Construction may be put which modifies meaning of words (Per *Special Bench*).

b Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words. [P 259 C 2]

C. P. C. —

(40) Chitaley, Preamble, Note 7 Pts. 2a and 8.

(41) Mulla, Page 2, Pts. (b) and (c).

(d) Stamp Act (1899), S. 33 — Court ordering document to be returned as not proved—Document is no longer part of judicial record and cannot properly come before Court again in performance of its functions unless it is allowed to be tendered in evidence on review — It remains in Court's custody only to be returned to party concerned (Per *Bhide and Din Mohammad JJ.*).

c When a Court orders a document to be returned because it is not proved it can no longer be considered to be part of the judicial record and cannot therefore properly come before the Court again in the performance of its functions, unless, of course by any chance, the order is reviewed and the document is allowed to be tendered again in evidence. But otherwise, it would remain in the custody of the Court after such order only for being returned to the party concerned. [P 260 C 2]

C. L. Agarwal — for Petitioner.

Basant Krishan, Assistant Advocate-General — for the Crown.

d SKEMP J. — This reference under S. 57, Stamp Act, has arisen in the following circumstances: Two adjacent houses in Dalhousie were owned by Mr. H. B. Robson, who bequeathed them to his two daughters. In 1920 one daughter sold one property by a registered deed to P. Shiv Narain; on 12th December 1928 the other daughter Mrs. McIver sold the other property through Mr. Thomas Beck, her attorney, to L. Puran Chand. This sale was oral, followed by delivery of possession and mutation. It was attested by a receipt, Ex. P-A, for Rs. 13,500. The receipt details the property sold and the furniture and gives the full and exact boundaries. It was afterwards registered. Another receipt for Rs. 13,500 was executed the same day, Ex. B. In 1938 the sons of P. Shiv Narain brought a suit against L. Puran Chand for possession of certain servants' quarters. The plaint said that the sale to L. Puran Chand was oral. In his written statement L. Puran Chand pleaded that he had bought the property defined by the boundaries in the receipt and in a plan given to the defendant. The receipt was attached to the written statement but it was not tendered or produced in evidence. Ultimately the dispute was settled by a reference to the revenue records and the plan, and an appeal in the High Court went on the same lines. During the trial, in June 1938, a Stamp Auditor pointed out to the learned Sub-Judge,

S. Mohindar Singh, that the document amounted to a conveyance and was under-stamped. On 10th June 1938 the Sub-Judge wrote on Ex. A an endorsement: "Returned, not proved"; but it was not taken off and remained on the record. On 30th August 1938 he pronounced judgment and the same day directed that the receipt Ex. A be impounded. This direction was oral and the Ahlmad wrote the order on the other receipt for Rs. 13,500, Ex. B, the order being signed by S. Mohindar Singh and dated 30th August 1938. The following day it was sent with a vernacular robkar to the Collector, as provided in S. 38, sub-s. (1), Stamp Act.

In the Collector's office it came to light that there was some error. On 21st December 1938 the Stamp Auditor asked the Sub-Judge to say whether a wrong document had not been sent and the same day S. Mohindar Singh sent the right document to the Collector. On 24th March the Collector signed an order to the effect that as the right document had not been impounded by the Sub-Judge, no action could be taken by the Collector and it was returned. The order impugned was then written on Ex. A and signed by S. Mohindar Singh. This order is not dated but a note attached also signed by S. Mohindar Singh, says "Returned. The document has now been impounded." This is dated 3rd April 1939, which was presumably the date on which the order was endorsed. The Stamp Auditor then reported that the document was a conveyance chargeable with duty of Rs. 405 and on 9th June 1939 the Collector ordered ex parte that the deficiency and five times the deficiency as penalty should be recovered. Lala Puran Chand applied for review of this order. The application was dismissed. He then lodged a revision in the Court of the Commissioner, Lahore Division. The Commissioner, Mr. Alan Mitchell, held that the document was a conveyance and that although the persons executing the document may have thought that they were keeping within the law, their intention was to execute a conveyance on a one anna stamp and he recommended that they should be mulcted in ten times the deficiency. The deficiency and penalty thus proposed amount to more than one-third of the price of the property. The matter came before the Financial Commissioner, Mr. C. C. Garbett, as Chief Controlling Revenue Authority, under S. 56 (1), Stamp Act. Under S. 57 (1) he stated the following questions for decision by the High Court:

1. If a civil Court, intending to impound Ex. 'A' signs an endorsement of impounding on the back of Ex. 'B', can the oral direction to impound Ex. 'A' be held to be a due impounding of that exhibit?

2. If not, can an endorsement of impounding on the back of document 'A' at a date when the case has been finished, serve to rectify the original error in endorsement?

3. If it is decided by one of the parties to a suit not to tender in evidence a document and if the Court inscribes thereon "returned" can the Court at a subsequent stage in the proceedings treat that document as being before it in the exercise of its functions, on the ground that the party to whom it would have been delivered had he claimed it, has failed to exercise his right of recovery?

4. When such a document is brought before the Chief Revenue Authority in an application for revision of an order of a Collector, whereby it has been assessed to duty and penalty, is that document before the Chief Revenue Authority in the exercise of his functions within the meaning of S. 53, Stamp Act, so as to validate an impounding by him?

Before stating the questions, the learned Financial Commissioner took the evidence of S. Mohindar Singh. The main points in his evidence are that his intention and order from the beginning was to impound Ex. A; but by mistake Ex. B was sent to the Collector. He stated that he knew Ex. A was liable to a penalty and drew the attention of the parties to the fact; they therefore tried to skirt round it without a reference. Ex. A was never tendered in evidence. Ex. B was also liable to a penalty. He might have written the judgment first and the endorsement of 30th August later. The learned Financial Commissioner held that the document was a conveyance, that the Sub-Judge had given a truthful account of what had happened, and on the questions (1) that it has been established that a genuine mistake had been committed, that it would seem equitable that effect should be given to the oral order, but that being the Chief Revenue Authority he might be biased, and he submitted the matter to the High Court; (2) that when the endorsement was made on Ex. A on 3rd April 1939, the Sub-Judge was functus officio and the learned Financial Commissioner thought that the writing of the endorsement served no purpose; (3) the Financial Commissioner thought that once the order of 10th June 1938 that the document should be returned was passed, the document was in the custody of the Court on behalf of the litigant and not in the exercise of its functions; (4) the Financial Commissioner who following a hint by the Commissioner, himself impounded the receipt Ex. A on 27th November 1940, held that "there can be no doubt but that in the ordinary sense of the English language the document has come before the said authority in the performance of his functions. But those functions should, I suggest, be limited to the determination whether the action taken by the lower Court was legally correct or not."

The case was argued before us on behalf of the petitioner by Mr. Chiranjiva Lal Aggarwal and on behalf of the Crown by Mr. Basant Krishan, assistant to the Advocate General, very ably on both sides. A question was raised whether the revenue authority was competent to make the reference but neither party contested it; indeed Mr. Aggarwal argued that the whole of the case was before us and desired us to give a ruling on the point whether Ex. A was a conveyance. Section 57 (1) runs:

"The Chief Controlling Revenue Authority may state any case referred to it under S. 56, sub s. (2) or otherwise coming to its notice, and refer such case, with its own opinion thereon."

In my opinion, "such case" refers to the questions propounded by the Financial Commissioner on which he felt doubt and not questions which he finally answered. I would, therefore, refuse to go into the character of Ex. A. Coming now to the questions, it would be dangerous to answer them in general terms, as they are couched, and our answers will be confined to the facts of this particular case.

Question 1:—"Impound" is not defined in the Stamp Act, and we must rely on its dictionary meaning. According to the Oxford Dictionary its meaning includes "to take legal or formal possession of;" according to Webster "to shut up and place in a pound; hence to seize and hold in the custody of the law;" according to Wharton's Law Lexicon, "to place a suspected document in the custody of the law." How is this done? An order of a Court may be given orally but it is always evidenced by a writing signed either by the presiding officer or by an officer of the Court. Here there was a writing signed by the Sub-Judge but it was placed on the

wrong receipt. In my opinion, although the Sub-Judge intended to impound Ex. A, the actual order signed by him the same day was to impound Ex. B.

Question 2:—When the trial finished on 30th August 1938, an endorsement on Ex. A executed on 3rd April 1939 does not rectify the original error as the Court was clearly functus officio.

Question 3:—In view of the previous two answers this question does not arise.

Question 4:—This is the only question which has caused me difficulty. Section 33 authorises a person having by law authority to receive evidence to impound a document which is produced or comes before him in the performance of his functions if it is not duly stamped. As the Commissioner first pointed out and as the Financial Commissioner agreed, in accordance with the plain meaning of the words the document Ex. A came before the Chief Revenue Authority in the exercise of his functions. But various rulings were referred in the course of arguments in which a Court was held to be not acting in the exercise of its functions or functus officio, or in which a document has not been held to be a conveyance. The rulings quoted before us include 131 P. L. R. 1906,¹ A.I.R. 1934 Lah. 637,² A. I. R. 1937 Mad. 763,³ 13 Lah. 745⁴ and A. I. R. 1930 Bom. 392.⁵ All these cases except A.I.R. 1937 Mad. 763³ were before Full Benches. Two of them, A.I.R. 1934 Lah. 637² and 13 Lah. 745⁴ were referred by the Chief Revenue Authority of this province to this Court. In none of these cases did the Chief Revenue Authority think fit to impound the document. He confined himself to the question whether the course pursued by the lower authorities was correct.

In the present case, if this reading of the section is correct, the Collector could have impounded the document Ex. A. But he did not do so and sent it back to the Subordinate Judge for an order impounding it. When the Financial Commissioner impounded the instrument, he should in accordance with S. 38, sub-s. (2), have sent it in original to the Collector. Instead of doing this, he has sent it to us with these questions. If the Financial Commissioner can impound, so can the Full Bench; but this course was not followed in any of the four cases which I have quoted, or in some others which we referred to. Din Mohammad J. pointed out that if the Full Bench could impound the document, then it was open to a Bench of this Court which had sent for an old record and there discovered an under-stamped document to impound the old document. This argument is a *reductio ad absurdum*. Maxwell on the Interpretation of Statutes, Chap. 9, page 202 of Edn. 8, begins:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words."

1. ('06) 131 P. L. R. 1906 (F. B.), *Mt. Jai Devi v. Gokal Chand*.

2. ('34) 21 A. I. R. 1934 Lah. 637 : 151 I. C. 708 : 86 P. L. R. 1 (S.B.), *Munshi Ram v. Harnam Singh*.

3. ('37) 24 A. I. R. 1937 Mad. 763 : 174 I. C. 20, *Panakala Rao v. Kumaraswami*.

4. ('32) 19 A. I. R. 1932 Lah. 495 : 188 I. C. 758 : 13 Lah. 745 : 83 P. L. R. 762 (S.B.), *Thakar Das v. Emperor*.

5. ('30) 17 A.I.R. 1930 Bom. 392 : 128 I.C. 31 : 32 Bom. L.R. 1084 (F. B.), *Collector, Ahmednagar v. Rambhan Tukaram*.

a In my opinion the wording of S. 38 referred in this case only to the proceedings before the civil Court and not to the subsequent proceedings before the Collector, the Commissioner and the Chief Revenue Authority. Therefore, I would answer this question also in the negative. There will be no order as to costs.

BHIDE J. — I agree with my learned brother Skemp J. in the answers which he proposes to give to the questions referred to this Court by the Financial Commissioner (the Chief Revenue Controlling Authority of this province) under S. 57, Stamp Act, and only wish to add a few remarks.

b *c* *d* *Question 1.* — As regards this question the Financial Commissioner has referred to the definition of 'impounding' as given in Stroud's Judicial Dictionary which is as follows: "A document is said to be impounded, when it is ordered by a Court to be kept in the custody of its officer." The question raised is whether the impounding takes place when the verbal direction is given or when the actual 'impounding' takes place, by taking the document into custody, writing an endorsement thereon or in some such manner. The question is one of some nicety, but after careful consideration, I am of opinion, that the "impounding" should be held to take place not when the oral order is given, but when it is carried out. For instance, supposing a witness produces a document and is deposing to it, when it is discovered by the Court that it is not properly stamped and is liable to be impounded and the Court orders it to be impounded, can it be said that the impounding takes place as soon as the order is given? I think not. In such a case, the document is not actually in the custody of any officer of the Court at the time when the order is passed. The 'impounding' in such a case would obviously take place when an officer of the Court takes the document into his custody. I, therefore, think that it should be considered to be impounded when it is actually taken into custody by an officer of the Court in pursuance of its order. In the present case there is a further difficulty, as the document was already in possession of the Court. But it was only in possession of the Court as a part of the record and not as an "impounded" document. An "impounded" document has to be dealt with in a certain manner according to law and the nature of custody of such a document is different. Consequently, it has to be separately dealt with for the purpose. The usual mode of signifying the act of impounding in such a case is to endorse the word 'impounded' on the document and affix the signature of the presiding officer to the endorsement so as to show that the nature of the custody of the document has changed and that it is to be treated thereafter as an "impounded" document. I would accordingly hold that in the case of a document which is already in the possession of the Court as part of a record, the "impounding" takes place, when an endorsement of the kind specified above is made thereon.

Question 2. — In the present instance, the endorsement on the document, which was intended to be impounded was admittedly not made till long after the decision of the case. In view of the answer to question 1, it must, therefore, be held that the document was impounded long after the Court had become *functus officio*. There is ample authority for the proposition that a Court has no power to "impound" a document under the Stamp Act, after it has become *functus officio*: see *a. g.*, 131 P. L. R. 1906¹ and A. I. R. 1930 Bom. 892.²

Question 3. — In view of the answers to the first and second questions, it is not necessary to answer this question, but as the question has been referred independently of questions 1 and 2, I may say that I am of opinion that when a Court orders a document to be returned because it is not proved, it can no longer be considered to be part of the judicial record and cannot therefore properly come before the Court again in the performance of its functions, unless, of course by any chance, the order is reviewed and the document is allowed to be tendered again in evidence. But otherwise, it would remain in the custody of the Court after such order only for being returned to the party concerned.

Question 4. — As regards the last question, the most important point to bear in mind, I think, is that the document came before the Collector as well as the higher revenue authorities in this instance as an "impounded document" for the proper duty and penalty being levied. There could be therefore no question of re-impounding the document. When the document came before the revenue authorities and a duty and a penalty was ordered to be levied, it was contended on behalf of the petitioner, that the Court had no jurisdiction to impound the document at the time when it did so. If the document was properly impounded, the Collector was, of course, empowered to levy the necessary duty and penalty and the only question which could be raised in revision before the higher revenue authorities would be that of the proper duty and penalty in the circumstances of the case. If, however, the Court had no jurisdiction to impound the document, the document could not be sent to the Collector at all and therefore the document could not in such a case properly come either before the Collector or the higher revenue authorities in the exercise of their functions. In the present case it has been found above that the Court had no jurisdiction to impound the document. It would therefore follow that the document did not properly come before the Collector or the higher revenue authorities in the exercise of their functions and consequently they were not competent to impound it.

DIN MOHAMMAD J. — I agree and have nothing to add.

G.N./R.K.

Answer accordingly.

* A. I. R. (29) 1942 Lahore 260

FULL BENCH

DALIP SINGH, DIN MOHAMMAD AND SALE JJ.

Gopi Mal — Judgment-debtor —

Appellant

v.

Vidya Wanti etc. — Decree-holders —

Respondents.

Letters Patent Appeal No. 121 of 1939, Decided on 18th December 1941, from order of Skemp J., in F. A. No. 308 of 1938, D/- 25th May 1939.

(a) Stamp Act (1899), S. 2 (15) — Partition decree drawn up without proper stamp — It cannot be said that decree is no decree at all. There may be irregularity or illegality in exercise of jurisdiction — But there is no lack of inherent jurisdiction.

Where the Court has drawn up a partition decree without the proper stamp whether after a considered decision or whether only by inadvertence,

a there is no lack of inherent jurisdiction, though there might be an irregularity or illegality in the exercise of jurisdiction and therefore it cannot be said that there is no decree in existence at all. There is a decree but not a decree that can be acted upon until proper stamp is supplied, but the decree can be validated by the addition of the proper stamp and therefore it cannot be said that there is no decree at all in the sense that that decree is merely a piece of waste paper which cannot be validated by the addition of the stamp unless the presiding officer re-signs the decree after it is stamped : ('29) 16 A. I. R. 1929 P. C. 279, *Rel. on* ; 32 Cal. 483 and ('32) 19 A. I. R. 1932 Lah. 249, *Expl.*; ('38) 25 A.I.R. 1938 Mad. 307, *Not approved*. [P 263 C 2]

C. P. C.—

('40) Chitaley, O. 20, R. 18, N. 8.

b *('b) Stamp Act (1899), Ss. 35 and 2 (15) — Unstamped partition decree — There is no lack of inherent jurisdiction in executing Court in executing decree without objection — But there is illegality affecting its jurisdiction in acting upon decree in violation of S. 35—Proper stamp supplied—Validity of decree dates back to date of decree — Execution petition instead of being struck off may proceed from that date — But it would not validate proceedings before stamp was supplied which would still be without jurisdiction.

c Where a partition decree is drawn up without proper stamp and the executing Court without objection proceeds to execution, there is no lack of inherent jurisdiction in the executing Court, to act upon the decree, that is to execute it but there is an illegality or error affecting its jurisdiction in proceeding to act upon a decree which the statutory bar provided by S. 35 forbids it from doing. Once the proper stamp is supplied, the validity of the decree would date back to the date of the decree and therefore the execution application instead of being struck off might proceed as from that date. But this would not validate the proceedings that had taken place before the proper stamp was supplied. Those proceedings would still be without jurisdiction in the sense that the Court was barred by statute from proceeding in the way it did without a proper stamp and therefore the proceedings were without any legal justification. [P 263 C 2; P 264 C 1]

*('c) Stamp Act (1899), Ss. 35 and 36 — S. 35 is wider than S. 36 — Admitting into evidence and acting upon are distinct — Court in executing unstamped partition decree acts upon it within S. 35—There is no question of admitting decree in evidence under S. 36 — Subsequent objection that decree could not be acted upon is not barred by S. 36.

Section 35 is in terms wider than S. 36, for while S. 35 refers both to admission in evidence and to acting upon and to registration and to authentication, S. 36 only refers to admission into evidence. There is obviously a distinction in admitting into evidence and acting upon. The whole of execution of a decree cannot be considered to be a mere matter of procedure. The acting upon is not a question of procedure : ('29) 16 A. I. R. 1929 P. C. 279, *Ref.* [P 264 C 1]

The words "acted upon" as used in S. 35 do not find a place in S. 36 and cannot be read into that section : ('16) 8 A. I. R. 1916 U. B. 2 and ('29) 16 A. I. R. 1929 Lah. 770, *Rel. on*. [P 264 C 2]

Where the executing Court executes an unstamped partition decree it acts upon the decree within

the meaning of S. 35. In such a case there can be no question of admitting the decree in evidence under S. 36 and inasmuch as S. 36 does not contain the words "acted upon" a subsequent objection on the ground that the decree could not be acted upon is not barred : ('32) 19 A. I. R. 1932 Lah. 249, *Approved*. [P 264 C 2]

M. C. Mahajan — for Appellant.

S. L. Puri for M. L. Puri and (later) M. L. Puri — for Respondents.

ORDER OF REFERENCE

Dalip Singh J. — A reference to arbitration was made by the parties Hans Raj and Gopi Mal on 14th June 1934 and an award which partitioned the property between them was delivered on 10th October 1934. The award contains certain clauses which are of importance in the present suit. By cl. (4) it was declared that Gopi Mal should pay to Hans Raj Rs. 5850. By cl. (5) it was declared that certain outstandings of which a list was given amounting to Rs. 4775 were the property of Hans Raj. It was further added that if out of these outstandings any sums had already been received then Gopi Mal was liable to pay the same to Hans Raj with interest after deducting the expenses of recovery. If any property was acquired out of these sums then Hans Raj was declared to be the owner and could recover it and Gopi Mal was to hand over the property without objection.

On 8th December 1934 an application was made to file the award and make it a rule of Court and a decree was passed on 31st March 1936 which though it referred to the award did not incorporate in so many words the award as part of the decree but referred only specifically to a clause in the award which had been varied by consent of parties and with which we are not now concerned. On 16th May 1936 execution was sought of the decree by Hans Raj for recovery of Rs. 23,000 odd. Rupees 5850 was claimed as due under cl. (4). Outstandings with interest stated to amount to Rs. 17,150 were claimed against Gopi Mal. On 8th June 1936 there was an order to attach certain land qua the cash demanded by the decree-holder. On 1st July 1936 Gopi Mal applied objecting to the attachment. He admitted receipt of Rs. 1447. He alleged that the figure of Rs. 17,150 was wrongly assessed, was contrary to the terms of the decree which did not give interest, that he was willing to pay and had actually paid into Court a sum of Rs. 5850 due under cl. (4) and was willing to pay Rs. 777 after deduction of expenses out of the sum of Rs. 1447 admittedly received by him from the outstandings. The Court ordered that Rs. 5850 be paid over to the decree-holder, that the sum of Rs. 777 be paid by a certain date and framed certain issues, namely, (1) what amount of realisation of outstandings by Gopi Mal above Rs. 1477 had been made; (2) what interest and at what rate was due to the decree-holder. A Commissioner was appointed on 2nd December 1936 to go into the accounts and he presented a report on 18th October 1937. He found that certain figures which are unnecessary to specify were the outstandings received. Objections were taken to the report of the Commissioner on 8th November 1937. After adjournment the case was fixed for argument for 30th November 1937. On that date further objections were raised, namely that there was no decree inasmuch as the award and the decree amounted to instruments of partition. They had not been stamped. Hence there was no decree capable of execution and nothing executable, that there was no money decree of the entire amount claimed in the award, the

^a award being merely declaratory qua the sum of money due. On the objection as to stamp being taken the Court impounded the documents and finally penalty was paid on 24th May 1938 and the decree was properly stamped. The trial Court held on various grounds which need not now concern us that the decree could not be enforced by means of the present application for execution and directed that the execution application be struck off.

On appeal the learned Judge in Single Bench held that there had been previous applications to execute the decree and that consequently various objections which had been relied upon in the trial Court were barred by the rule of constructive res judicata. As regards the lack of stamp the appellate Court held that stamp had been duly paid on the date given above, namely, 24th May 1938. Hence there was no force in the objections of the judgment-debtor which ^b were either barred and could not be raised or were futile in view of the fact that the stamp penalty and duty had been paid. He, therefore, accepted the appeal, set aside the order of the executing Court dismissing the execution application and directed that the executing Court proceed in accordance with law. From that decision a Letters Patent Appeal has been taken before us.

It is unnecessary to go into the various intricate points of law which were argued before us because in my view there is one point which if decided in favour of the appellant would cause the appeal to succeed. The learned counsel for the appellant contends that whatever might be the position today at the time when the matter was before the trial Court there was no executable decree. In fact there was no decree at all up to the date when the penalty was paid, namely, on 24th May 1938. Therefore he contends that all the proceedings from 16th May 1936 up to the date when the further objections were taken, namely, 30th November 1937, the proceedings were *coram non judice* because in the absence of any executable decree the executing Court lacked inherent jurisdiction to deal with any execution application. The question whether a decree in a partition suit exists or does not exist for purposes of execution or any other purpose is a matter of some difficulty. In A.I.R. 1932 Lah. 249¹ at p. 250 I held with some hesitation that until there was a stamped decree there was no decree in the eye of the law at all. This view seems also to have been accepted in A.I.R. 1938 Mad. 307² and 32 Cal. 483³ namely that in a partition suit whatever may be the case in other forms of suits there is no decree or no valid decree till the instrument of partition ^d whether an award or decree is properly stamped and the suit cannot be held to be finally decided merely by a judgment or by an unstamped decree. If this view of the situation were correct, no question would arise of any rule of constructive res judicata because the proceedings being *coram non judice* there cannot be any application of the principles of constructive res judicata. The point however is not free from difficulty. It may be contended that there is a decree and at any rate the question whether the decree was valid or not without a stamp was a question for the executing Court to decide and if either impliedly or directly it wrongly decided that there was a decree it would not be a question of lack of

inherent jurisdiction but merely an illegality or material irregularity in the exercise of jurisdiction. As my learned brother feels some doubt on the subject I would agree with him in referring the following questions to the decision of a Full Bench namely: (1) Whether in a partition suit there is in existence any decree until a properly stamped decree is drawn up in accordance with the provisions of S. 2 (15), Stamp Act. (2) If a decree is drawn up without proper stamp and the executing Court without objection proceeds to execution, is there lack of inherent jurisdiction in the executing Court in so proceeding? The appeal can be disposed of after the decision of the Full Bench.

Din Mohammad J.—I agree but I would like to make it clear that my difficulty arose mainly in reference to S. 36, Stamp Act. This section reads as follows:

"Where an instrument has been admitted in evidence, such admission shall not, except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

In the Commentary on the Indian Stamp Act by Mulla and Pratt it is remarked that S. 36 has been held not to apply when the lower Court has ordered execution of an unstamped decree for partition, as such a decree has no existence as a decree and cannot be executed. This remark is based on a judgment of my learned brother as reported in 135 I. C. 685.¹ A perusal of that judgment, however, shows that my learned brother adopted that view with some hesitation and as in my view the question involved in this case was important, I suggested that the matter be laid before a Full Bench. One of the questions to be decided as I understand is whether a judgment-debtor can at any subsequent stage of the same proceedings be allowed to raise an objection on the score of the decree being unstamped, if no such objection had been raised by him before. If it is decided that the executing Court had no jurisdiction whatever to execute the unstamped decree, a subsequent objection may be permitted as being one of jurisdiction. If, on the other hand, it is found that there was no lack of inherent jurisdiction in the executing Court, this objection may be barred. My learned brother thinks that this point is covered by and included in question 2 as proposed by him, and I do not propose to formulate a separate question on that matter.

OPINION OF FULL BENCH

DALIP SINGH J.—The facts of this case are fully stated in the order of reference dated 18th November 1941 and that order should be taken as part of the present judgment. Two points were referred by the Division Bench for the decision of the Full Bench, namely, one, whether in a partition suit there is in existence any decree until a properly stamped decree is drawn up in accordance with the provisions of S. 2 (15), Stamp Act. This question arose by reason of certain observations made in 32 Cal. 483,³ which was approved in A. I. R. 1935 Cal. 125,⁴ an observation in A. I. R. 1932 Lah. 249¹ and observations in A. I. R. 1938 Mad 307.² In 32 Cal. 483,³ however, there was no final decree drawn up by the Court at all. In fact the Court had refused to draw up a final decree and all that their Lordships of the Calcutta High Court decided was that until a properly stamped decree was drawn up, the suit for partition must still be considered pending.

1. ('32) 19 A.I.R. 1932 Lah. 249 : 135 I. C. 685 : 33 P.L.R. 343, Dillbagh Bai v. Mt. Tika Devi.

2. ('38) 25 A.I.R. 1938 Mad 307 : 153 I. C. 33, Subbaraman v. Paramkumari Nammayya.

3. ('35) 32 Cal. 483, Jotindra Mohan Tagore v. Baidy Chandra.

4. ('35) 22 A.I.R. 1935 Cal. 125 : 154 I. C. 458 : 33 G.W.N. 1318, Joseph Chandra v. Mohan Mohan.

a It is true that their Lordships said at p. 491, "the Court cannot frame its decree until such act is performed, the adjudication contained in the judgment does not decide the suit." The point raised in the present suit is different, because here the Court drew up a decree, though without having the stamp paper before it. The reason for this appears to be that the decree was drawn up in the form of a decree for possession of a certain property. There was no doubt a reference made to the terms of the award, but it appears that the Court was really referring to those terms of the award which directed delivery of certain property and which were a variation in the terms of the award by consent of the parties, by which one property was not to be delivered according to the terms of the compromise varying the award. In A. I. R. 1932 Lah. 249,¹ a decision by myself, in the course of a discussion of the point which is really covered by the second question referred to the Bench, I observed as follows :

b "The decree not having been drawn up on a stamp paper it cannot be considered to be a decree at all and therefore there is nothing for the executing Court to act upon."

This observation should, I think, now be understood with reference to the discussion on the facts of that case and it means only that there is not a decree which can be acted upon by the executing Court and not to decide the question whether such a decree is a decree at all or not in the sense of the original Court lacking inherent jurisdiction to pass such a decree. In A. I. R. 1938 Mad. 807,² it was observed at page 812 :

c "It is well settled that a final decree for partition has no existence as a decree until it is engrossed on the proper non-judicial stamp paper; till that is done the suit is pending: vide 32 Cal. 483."³

As already pointed out, the facts in 32 Cal. 483³ were somewhat different and the question is not where a final decree has been refused whether the suit can be regarded as still pending but the question now is whether when a decree has wrongly been drawn up without a stamp paper, whether the suit could still be regarded as pending because in the eye of the law there is no decree at all. In this connexion reference must be made to the decision of their Lordships of the Privy Council in 7 Rang. 624.⁵ The question there was whether a document which had been registered by the Registrar drawn up on an insufficiently stamped paper was to be considered non-registered because of lack of inherent jurisdiction in the Registrar to register a document which was insufficiently stamped. Their Lordships of the Privy Council pointed out in that case that it was the duty of the Registrar to decide whether the document was properly stamped or not and that he purported to decide, wrongly perhaps, that the document was properly stamped. Their Lordships then proceeded to hold that such a registration might involve an error of procedure but did not affect jurisdiction in the sense that there was inherent lack of jurisdiction in the Registrar to so wrongly decide and, if he so decided wrongly, that the registration was wholly void. I consider that the same principle applies to the case where a Court has wrongly drawn up a decree without the proper stamp. It was rightly conceded by the learned counsel for the appellant that if the Court had directed its mind to the subject and had, however, wrongly considered that the decree did not require a stamp, then the

Court could pass a decree without a stamp paper and such a decree could only be set aside by appeal to the appellate Court, but otherwise would be a valid decree. He contended, however, that in this case the mind of the Court was not directed to the point at all and it was only by inadvertence that the Court passed a decree without asking for a proper stamp to be supplied by the decree-holder. This may make some practical difference in certain cases into which it is unnecessary to enter, but it appears to me that whether the matter was done after a considered decision or whether it was only by inadvertence, there is still no lack of inherent jurisdiction, though there might be an irregularity or illegality in the exercise of jurisdiction. I would, therefore, answer the question referred by the Division Bench as stated above. It is difficult to answer it either in the affirmative or in the negative, because, while there is not a decree that can be acted upon, there is a decree which may at any moment, by the provision of the stamp, be validated. If there was lack of inherent jurisdiction in the Court, the decrees could not be validated by the subsequent addition of the stamp. The position, therefore, is that there is a decree but not a decree that can be acted upon until proper stamp is supplied, but the decree can be validated by the addition of the proper stamp and therefore it cannot be said that there is no decree at all in the sense that that decree is merely a piece of waste paper which cannot be validated by the addition of the stamp unless the presiding officer re-signs the decree after it is stamped.

The second question referred again raises a point which is difficult to answer by a simple affirmative or negative. I thought at the time of drawing up this question that the point was sufficiently covered by the form in which I drew up the question. My learned brother, and it appears now, rightly considered that the point that was really in issue was not really clearly brought out in the question referred and fortunately drew up a note, which should also be read as part of this judgment, pointing out that the question was whether when an unstamped decree is presented before an executing Court and the Court proceeds to execute it, or in other words to act upon it, should it be considered that S. 38 debars the appellate Court from raising the question of stamp afresh, or should it be considered that under S. 35 the statutory bar prevents the Court from acting upon the decree and therefore that the executing Court's proceedings up to the time when the decree is validated by the putting in of a proper stamp are illegal and in this sense without jurisdiction. The question actually referred relates to the lack of inherent jurisdiction in the executing Court in so proceeding. I do not think it can be said that there is any lack of inherent jurisdiction in the executing Court, because here again it was rightly conceded by the learned counsel for the appellant that if the Court had applied its mind to the subject and had decided that the decree could be acted upon in spite of the lack of stamp, then the only remedy of the appellant would have been to appeal against the order of the executing Court and the order, without being set aside on appeal, would have been a valid order. The mere fact that by inadvertence the Court did not consider the point at all, as nobody drew its attention to it, would not in my opinion, show that there was lack of inherent jurisdiction in the Court to act upon the unstamped decree.

In this case it is clear that when the point was brought to its notice, the executing Court did consider that it had no power in face of the statutory

5. (29) 18 A. I. R. 1929 F. C. 379; 120 I. C. 645; 7 Rang. 624; 58 I. A. 379 (P. C.). Ma Pwa May v. Chetwar Firm.

a bar to act upon the unstamped decree. The position, therefore, really is whether, in the circumstances of this case, it should be held to be impliedly decided by the Court that the decree was properly stamped and that, therefore, the decree had been admitted into evidence under the terms of S. 36 and hence the appellate Court could not take any notice of the fact that the decree was not properly stamped, or whether, as stated in A. I. R. 1932 Lah. 249,¹ the correct way of looking at the matter is that the point was before the executing Court and before the appellate Court to decide as a matter of mixed fact and law whether the decree, which the executing Court was required to act upon, was properly stamped or not and no question arose of admitting the decree into evidence at all. I consider that, as pointed out in A. I. R. 1932 Lah. 249,¹ the correct way of looking at the matter is that there is here no question of admitting the decree into evidence which would be covered by the terms of S. 36. The correct way of looking at the matter is that the question here was whether there was a decree that could be acted upon and the appellate Court was at liberty to consider the decision of the executing Court on the question. It must be pointed out that S. 35 is in terms wider than S. 36, for while S. 35 refers both to admission in evidence and to acting upon and to registration and to authentication, S. 36 only refers to admission into evidence. There must be obviously some distinction in admitting into evidence and acting upon. I do not think it can be doubted, and indeed it was conceded at the bar, that when an executing Court is asked to execute a decree, it is asked to act upon the decree. I do not think that the whole of execution of a decree can be considered to be a mere matter of procedure. In 7 Rang. 624,⁵ their Lordships, while pointing out that admission into evidence and authentication were questions of procedure, did not say that acting upon was a question of procedure also. I, therefore, consider that the position really is this: There was no lack of inherent jurisdiction in the executing Court to act upon the decree, but there was an illegality or error affecting its jurisdiction in proceeding to act upon a decree which the statutory bar provided by S. 35, Stamp Act, forbade it from doing. It is true, or might be true, that once the proper stamp was supplied, the validity of the decree would date back to the date of the decree and therefore the execution application instead of being struck off might proceed as from that date. But this would not validate the proceedings that had taken place before the proper stamp was supplied. Those proceedings would still be without jurisdiction in the sense that the Court was barred by statute from proceeding in the way it did without a proper stamp and therefore the proceedings were without any legal justification. I would so answer the second question referred to the Full Bench. The case should now go back for final disposal to the Division Bench in the light of the decision given above.

DIN MOHAMMAD J. — The two questions falling for determination before the Full Bench in brief are (1) whether a decree in a partition suit is no decree at all unless and until it is properly stamped under Art. 45, Stamp Act, and (2) whether a judgment-debtor is entitled to raise an objection on the score of its not being an executable decree at a later stage of the same execution proceedings, if at an earlier stage he does not raise that objection. After going through the authorities cited at the bar, I am definitely of opinion that so long as the decree remains unstamped, it cannot be said that

it is no decree at all in any sense of the term. Of course, it is an inexecutable decree inasmuch as S. 35, Stamp Act, clearly lays down that no Court can act upon, register, authenticate or admit in evidence any instrument unless proper duty is paid thereon. A decree is the final pronouncement of the Court in relation to the matter in issue before it and as soon as that final order is pronounced, the decree follows in accordance with O. 20, Civil P. C. It is nowhere laid down in the Code itself that a decree in a partition suit will not be a valid decree unless it is stamped and consequently it cannot be urged that an unstamped decree is no decree at all. Coming now to the second question, S. 36, Stamp Act, reads as follows:

"Where an instrument has been admitted in evidence, such admission shall not, except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

As against this, the material portion of S. 35 of the same Act runs as follows:

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped."

It is obvious that the words "acted upon, registered or authenticated" have not been inserted in S. 36. In the Commentary on the Stamp Act by Mulla and Pratt, it is stated at p. 138 that unless "acted upon" is also read into the words used in S. 36, the section would be reduced to a dead letter. I do not consider, however, that this is so and in this connexion I respectfully agree with the remarks made in 33 I. C. 595⁶ and A.I.R. 1929 Lah. 770.⁷ The making of a decree consequent upon the admission in evidence of a certain instrument may be one form of acting upon the document; but this is not the only form of acting upon it and while the former may be included in admitting in evidence, it does not follow that every kind of acting upon an instrument is covered by the words "admitted in evidence" as used in S. 36. In the present case when execution proceedings were taken out, no decree was admitted in evidence—in fact none was produced—and consequently it cannot be urged in any manner that the Court while making an order in respect of certain payments or issuing a commission had admitted the decree in evidence. All that can be said is that it had in a way acted upon it, but inasmuch as S. 36 does not contain the words "acted upon," a subsequent objection on the ground that the decree could not be acted upon is not barred. It is a fundamental rule of the interpretation of statutes that words which do not exist there cannot be read into them and especially words which bear a different meaning from the words used in the statute itself cannot at all be imported under any canon of law. As stated above, in S. 35 the words "acted upon" stand in the same category as the words "registered or authenticated" and if it is once held that the words "acted upon" are included in the words admitted in evidence, it shall also have to be held that the words "registered and authenticated" are similarly included and it need

6. (16) 3 A. I. R. 1916 U. B. 2 : 33 I. C. 595, *Mi Mi v. Sohan Singh*.

7. (29) 16 A. I. R. 1929 Lah. 770 : 119 I. C. 435 : 11 Lah. 77 : 31 P. L. R. 360, *Gurdas Mal Ramchand v. Guranditta Mal*.

a not be observed that this will not be possible. It is clear therefore that on the terms of S. 38 the objection now raised by the judgment-debtor is not competent. I would answer the questions in the manner indicated above.

SALE J. — I agree with the answers proposed, and have nothing to add.

G.N./R.K.

Order accordingly.

*** A. I. R. (29) 1942 Lahore 265**

DIN MOHAMMAD J.

Lala Uttam Chand — Plaintiff —
Petitioner

v.

b *Perman Nand and others—Defendants*
— Respondents.

Civil Revn. Petn. No. 227 of 1941, Decided on 9th February 1942, for revision of order of Sub-Judge, First Class, Rawalpindi, D/- 15th March 1941.

(a) Civil P. C. (1908), S. 115 — Order impounding document and forwarding it to Collector for necessary action under Stamp Act is case decided within S. 115—Fact that proceedings are going on before Collector cannot deprive High Court of jurisdiction to go into matter — Collector under S. 38 (2), Stamp Act derives jurisdiction from order made within Act — High Court can determine whether order was ultra vires.

c An order impounding a document and forwarding it to the Collector for necessary action under the Stamp Act is a case decided within the meaning of S. 115, Civil P. C., inasmuch as the matter which was disputed between the parties qua the aspect of the case relating to the duty leviable on the document so far as the parties are concerned must be taken to have been finally set at rest and no stage will ever arise later at which the order impounding the document would be liable to be attacked. Hence the order is open to revision under S. 115 : (24) 11 A.I.R. 1924 Lah. 425 (F. B.), *Ref.* [P 266d]

d The fact that proceedings are being taken in the Court of the Collector pursuant to the order made by the civil Court forwarding the document to him cannot deprive the High Court of jurisdiction to go into the matter, inasmuch as so far as S. 38 (2), Stamp Act, is concerned the Collector derives his jurisdiction only from the order which has been made within the Act and if an order is made which is ultra vires even the Collector's jurisdiction is not being properly exercised. It is important therefore for the High Court in revision to determine whether the civil Court had any authority to impound the document under S. 38, Stamp Act, and if so whether there was any deficiency in the stamp. [P 266e]

C. P. C. —

(40) Chitaley, S. 115, N. 4.

(41) Mulla, Page 411, Note "Interlocutory orders"; Page 415, Pt. (g).

* (b) Stamp Act (1899), S. 33—No Court has right to compel party to produce document against his wishes—Word "produced" in S. 33 — Meaning—It is highly improper for Court to compel party to produce document with view to impound it because it was informed that it was insufficiently stamped — Such action must be deprecated.

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e No Court has any right to compel any party to produce a document against his wishes. If the document is material, the party not producing it will suffer the consequences. The word "produced" as used in S. 33 means produced in the ordinary course of law and not produced under compulsion. If this were not so, a Court will be competent to conduct a search in the house of a party and seize all documents insufficiently stamped for the purpose of impounding them. It is highly improper for a Court to compel a party to produce an original document with a view to impound the document, because the Court has been informed that it is not sufficiently stamped. Such action cannot but be deprecated in most unambiguous terms. It is open to the party's counsel to refuse to obey the order of the Court in this respect. [P 266f,g,h]

f (c) Stamp Act (1899), S. 33—Nature of document can be determined only from its language and purpose which it was intended to serve — Object of document either to transfer or surrender mortgage rights — Document must be treated either as transfer of mortgage rights or as deed of release.

The nature of a document can be determined only from the language it employs and the purpose which it is intended to serve. It is not permissible to look at the document in the light of the plaint drafted several months after its execution. When the object with which the document was executed was either to transfer or to surrender certain mortgage rights in favour of the plaintiff it cannot but be treated either as a transfer of mortgage rights or as a deed of release in favour of the plaintiff : (42) 29 A. I. R. 1942 Lah. 50 (F. B.), *Rel. on.* [P 267a]

g (d) Stamp Act (1899), Ss. 38 and 33 — Document illegally impounded by Court and sent to Collector—Collector cannot impound document of his own accord.

Where a document is illegally impounded by the Court it cannot be sent to the Collector at all and therefore the Collector to whom the document has been sent cannot impound it of his own accord : (42) 29 A. I. R. 1942 Lah. 257 (S. B.), *Rel. on.* [P 267b]

Dr. Mohammad Alam and Narotam Singh —
for Petitioner.

Mehr Chand Mahajan ; D. R. Sawhney and
Basanti Krishan Khanna (Assistant to Ad-
vocate-General)—for Respondents 1; 2 to 5 and
6 respectively.

h ORDER. — This petition has arisen in the following circumstances. A joint Hindu family firm composed of Amin Chand, Uttam Chand and Fakir Chand owned considerable property in Rawalpindi. On 8th August 1940 a deed of partition was prepared and duly registered. It was stated therein that some of the property belonging to the firm had already been partitioned in 1938 and that the remaining property was partitioned on that day. On the same day, another document was executed by which Fakir Chand and the three sons of Amin Chand surrendered their right in certain properties mortgaged with them on behalf of one Parma Nand. The material portion of that document reads as follows :

"As the members of the firm have separated, the sum mentioned above together with interest in respect of the mortgage rights is transferred in favour of Uttam Chand and it is set forth that neither the executors, nor their assigns or heirs will have

any concern with those rights. Lala Uttam Chand will be authorised to realise the security in any manner he likes."

On 14th January 1941, Uttam Chand instituted a suit on the foot of this mortgage against Parma Nand and impleaded the other members of the firm as defendants. In para. 10 of the plaint, it was stated that the mortgage rights had been allotted to the plaintiff as a result of the partition. Parma Nand resisted the suit on various grounds and inter alia denied the correctness of para. 10 mainly on the score that no proper document had been executed in respect thereof. The other defendants, however, admitted the correctness of the assertion made therein. After the filing of the written statements, the parties were called upon to submit a list of all the documents that were relied on by them.

On 13th March 1941 the plaintiff put in a list in which at No. 2 the following words appear: "Original document dated 8th August 1940 in possession of the plaintiff." At the foot of this document, a note was added stating that inasmuch as there was danger of the original documents being lost, certified copies only would be produced in Court. What happened afterwards is not recorded anywhere except in the order of the Court under revision. It appears that at the time when this list was put in, counsel for the plaintiff made a verbal request to the Subordinate Judge that he be allowed to produce only the certified copies of the documents mentioned in the list. A clerk of the contesting defendant's counsel was present there. He raised a protest and at the same time brought his own counsel on the spot. Defendant's counsel made a request to the Court that inasmuch as one of the documents "to be produced" by the plaintiff was liable to penalty under the Stamp Act, the plaintiff should be called upon to produce the original documents instead of certified copies. The Subordinate Judge fell into line with this suggestion and compelled the plaintiff to produce the original document relating to the surrender of rights in his favour. On this order being complied with, the services of a Stamp Auditor were at once requisitioned and it was found that there was a deficiency of Rs. 817-8-0 in the duty leviable on that document and further that a penalty of Rs. 8175, was payable in respect of that duty. The Subordinate Judge at once impounded the document although arguments were addressed to him on behalf of the plaintiff that even on the face of it the document which was sought to be impounded was either a deed of release covered by Art. 55, Stamp Act, or a transfer of mortgage rights covered by Art. 62 (c), Stamp Act. The Subordinate Judge, however, did not agree and after impounding the document forwarded it to the Collector for necessary action. It is against this act of the Court that this petition has been submitted.

Counsel for the contesting respondent urges that inasmuch as the order of impounding the document is only an interlocutory order, no revision lies in view of 5 Lah. 288.¹ I do not agree. This is a case decided within the meaning of S. 115, Civil P. O., inasmuch as the matter which was disputed between the parties qua this aspect of the case has, so far as the parties are concerned, been finally set at rest and no stage will ever arise later at which this order of the Subordinate Judge would be liable to be attacked. This being so, I consider that this is a case decided within the meaning of S. 115, Civil P. O.,

¹ (1934) 11 A. I. R. 1924 Lah. 425 : 84 I.C. 259 : 5 Lah. 288 (P.B.), Lalchand Mangal Sain v. Behari Lal Mangal Chand.

and hence the petition is competent. Counsel for the respondent has further urged that inasmuch as proceedings are being taken in the Court of the Collector pursuant to the order made by the Subordinate Judge forwarding the document to him, the civil Court has no jurisdiction to go into the matter. There also I do not agree. So far as S. 38, sub-s. (2), Stamp Act, is concerned, the Collector derives his jurisdiction only from the order which has been made within the Act and if an order is made which is ultra vires even the Collector's jurisdiction is not being properly exercised. It is important, therefore, to determine in this matter whether the Subordinate Judge had any authority to impound the document under S. 38, Stamp Act, and if so, whether there was any deficiency in the stamp. The material portion of S. 38 reads as follows:

"Every person having by law or consent of parties authority to receive evidence, . . . before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same".

Suffice it to say that from what has been stated above, it cannot at all be reasonably urged that the document was either produced before the Subordinate Judge or came before him in the performance of his functions. If the misguided act of the Subordinate Judge taken presumably at the most ill-conceived suggestion of the defendant's counsel is countenanced, there will be no end to the mischief done in the Courts below. It is always overzeal in a matter that spoils things and in this case both the defendant's counsel and the Subordinate Judge were guilty of it. No Court has any right to compel any party to produce a document against his wishes. If the document is material, the party not producing it will suffer the consequences. The word "produced" as used in S. 38, in my view, means produced in the ordinary course of law and not produced under compulsion. If this were not so, a Court will be competent to conduct a search in the house of a party and seize all documents insufficiently stamped for the purpose of impounding them. It is urged on behalf of the petitioner that even if a document is merely placed on the record, it is not produced, for, if it is left unproved, it is nothing but a waste paper. A document is produced by a party only when it is sought to be proved and a witness is examined in respect thereof and not earlier. Be that as it may, it is highly improper for a Court to compel a party to produce an original document with a view to impound the document, because the Court has been informed that it is not sufficiently stamped, and this action cannot but be deprecated in most unambiguous terms. As I look at the matter, it was open to the plaintiff's counsel to refuse to obey the order of the Court in this respect. Further, it is doubtful whether the document mentioned in the list was the document which was subsequently impounded or the deed of partition, as both bore the date 8th August and the word used in the list is singular and not plural. Moreover, even if the document mentioned in the list was the document subsequently impounded, it is not certain whether, in face of the admission made by the non-contesting defendants, it would ever have been necessary for the plaintiff to have produced it at all or led any evidence in respect thereof. In these circumstances, I have no hesitation in holding that the document was neither produced by the plaintiff nor did it come before the Subordinate Judge in the performance of his functions. The Subordinate Judge, therefore, went out of his way in making

the order for producing the document and in subsequently impounding it.

Even on the merits, I am satisfied that the document was properly stamped from whatever point of view it was looked at. Counsel for the respondent argues that this document should be looked at in the light of the plaint that was drafted several months after its execution. This, however, is not permissible. The nature of a document can be determined only from the language it employs and the purpose which it is intended to serve, and, as stated above, the object with which the document was executed was either to transfer or to surrender certain mortgage rights in favour of the plaintiff. This being so, it could not but be treated either as a transfer of mortgage rights or as a deed of release in favour of the plaintiff. On neither of these two grounds the document was chargeable with more than Rs. 7-8-0 and was thus not liable to be impounded on the ground that the requisite duty had not been paid. Reference in this connexion may be made to A.I.R. 1942 Lah. 50.² I accordingly allow this petition, set aside the order of the Subordinate Judge impounding the document and direct him to receive it in evidence if and when produced without calling upon the plaintiff to pay any duty or penalty in respect thereof. This would automatically put an end to the proceedings now pending before the Collector, inasmuch as the action taken by the Subordinate Judge under section 33 was altogether illegal and uncalled for. It may be observed that in view of a Full Bench decision of this Court in Civil Ref. No. 2 of 1941³ decided on 4th June 1941, the Collector cannot impound the document in question of his own accord in the present circumstances. The contesting respondent will pay the costs of the petitioner in this Court.

G.N./R.K.

Petition allowed.

2. ('42) 29 A.I.R. 1942 Lah. 50 : 199 I.C. 161 : 44 P. L. R. 10 : I.L.R. (1942) Lah. 282 (F. B.), Shiv Ram Punnam Ram v. Faiz.
3. Reported in ('42) 29 A. I. R. 1942 Lah. 257 (S. B), Puran Chand v. Emperor.

* A. I. R. (29) 1942 Lahore 267

TEK CHAND AND BECKETT JJ.

*Tropical Insurance Co. Ltd., New Delhi,
through Lala Shadi Rum, Manager—
Petitioner*

v.

The Superintendent of Insurance, Commerce Department, Government of India, New Delhi—Respondent.

Civil Revn. Petn. No. 78 of 1942, Decided on 19th March 1942, referred to by Abdul Rashid J., D/- 24th February 1942.

(a) Insurance Act (1938), S. 33 — District Judge dealing with application under S. 33 is Court of Civil Jurisdiction within S. 141, Civil P. C. — Hence revision lies under S. 115, Civil P. C., from order of District Judge under S. 33.

It may be necessary to make special provisions in an Act for appeals from orders in regard to which the Civil Procedure Code itself makes no provision; but S. 141, Civil P. C., is sufficient to bring S. 115, Civil P. C., into operation and to allow revision if the matter itself can be regarded as a case decided by a Court of civil jurisdiction subordinate to the

High Court. Since the Court to which an application may be made under S. 33, Insurance Act, is defined in S. 2 (6) of that Act, as the principal civil Court of original jurisdiction in a district an order passed by that Court is revisable under S. 115, Civil P. C. [P 268d,e]

Moreover where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is that the Court will determine the matters as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same : 1913 A. C. 546, *Rel. on.* [P 269e]

On an application under S. 33, Insurance Act, the District Court does not act merely in an administrative capacity but exercises judicial function inasmuch as it is required to hear both the parties and then decide whether a particular order should be maintained or not, which can presumably be done only after a judicial finding on the merits of the case. Since the District Court acts as a Court of civil jurisdiction in dealing with an application under S. 33, Insurance Act, there can hardly be any question that it is subordinate to the Court having jurisdiction to entertain appeals from other orders made by the same Court under the same Act. [P 268g : P 269b,c]

The District Court nominated under S. 33, Insurance Act, was so nominated because it already enjoyed the powers given to a civil Court under the Code of Civil Procedure. If use is to be made of these powers, however, the other provisions of the Code must also be applied, including the provisions for revision contained in S. 115, Civil P. C.: *Case law discussed.* [P 269f]

The order which may be passed by the District Court under S. 33, Insurance Act, is in the nature of an injunction or mandamus. The power to issue an injunction, in the ordinary way is always a matter of discretion, but this does not exclude the power to revise when there has been an irregularity in the exercise of jurisdiction. [P 268g]

C. P. C. —

('40) Chitaley, S. 141, Notes 2, 6.

('41) Mulla, Page 448, Note "Proceedings in any Court of civil jurisdiction."

(b) Insurance Act (1938), S. 33 — Mode in which application under S. 33 should be dealt with by District Judge, indicated.

Since S. 33 contemplates a summary enquiry before an order for a more thorough investigation is made, it would not be proper to lay down any rigorous rules of procedure or fetter in any way the discretion of the District Court in regard to matters as to the nature of the evidence to be taken. Before it could be said whether it is necessary or not to have an investigation into the affairs of the Company conducted by an actuary or auditor or both, it is clearly necessary to ascertain exactly over what points the parties are at issue and whether the grounds given by the Superintendent for ordering such investigation are well-founded or not. Before an application under S. 33 can be dismissed there must at least be some serious attempts to see whether the party affected by the order has good reasons for opposing the investigation, even though it may be not possible to do more than conduct a summary enquiry. The final order should at least give some indication of the matters substantially in dispute between the parties and the reasons for dismissing the application. If the District Judge comes

a to the conclusion that there are any points which can only be satisfactorily cleared up by means of expert investigation, this might be itself a reason for rejecting the application under S. 33; but the reason should at least be stated; and the application should not be dismissed until the Company has had a reasonable opportunity of producing evidence in support of its claim. But merely to allow a party to put documents on the record without any means of proving their contents to be correct, when this is denied by the other side, does not amount to the taking of evidence in any true sense of the word and does not afford a basis for judicial determination. [P 270c,d,f,h; P 271a]

* (c) Insurance Act (1938), S. 33 — Application under S. 33 — Order by District Judge — Revision—Company can show not only that reason for investigation was issued without good reason but also that the reasons have disappeared and that investigation is not necessary.

In the revision by the Company against an order dismissing its application under S. 33 the Company is not limited to showing that the order was issued without good reason in the first instance, but is entitled to show that the reasons have disappeared and that there is no longer any necessity for an investigation from outside. [P 270e]

M. C. Mahajan, R. L. Anand and Veda Vyasa
— for Petitioner.

Basant Krishen Khanna, Assistant to Advocate-General — for Respondent.

BECKETT J. — The Tropical Insurance Co. Ltd., was incorporated in 1927, before the Insurance Act of 1938 came into force. On 11th March 1941, the Superintendent of Insurance informed the Company that he had reason to believe that the interests of the policy-holders were in danger; and on 27th March, after considering the representations made on behalf of the company, he ordered an investigation into the affairs of the company under S. 33 of the Act. The company then applied to the District Court at Delhi for a prohibitory order under sub-s. (2) of the same section on the ground that such an investigation was unnecessary. This application was rejected by the District Judge on 19th January 1942, and the company then came up to this Court for revision of the order rejecting the application. The petition for revision first came before a single Bench for disposal; but as a preliminary point had been raised with regard to the powers of the High Court to interfere in revision with an order passed by the District Court under S. 33, Insurance Act, the case was referred to a Division Bench for disposal. Section 110, Insurance Act, deals with appeals from various orders which may be passed by a District Court under various sections of the Act, and orders under S. 33 are not among those which are made subject to appeal; nothing is said about revision. This in itself does not mean that the power of High Court to interfere in revision was intended to be excluded, if the proceedings in the District Court are to be regarded as proceedings in a Court of civil jurisdiction. Section 141, Civil P. C., runs as follows:

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

It may be necessary to make special provisions in an Act for appeals from orders in regard to which the Code itself makes no provision; but S. 141 is sufficient to bring S. 115 into operation and so the order in this matter itself can be regarded as

a case decided by a Court of civil jurisdiction subordinate to the High Court. Since the Court to which an application may be made under S. 33, Insurance Act, is defined in S. 2 (6) as the principal civil Court of original jurisdiction in a district, this in itself would seem sufficient to conclude the matter; but counsel for the Superintendent of Insurance contends that in the present case the District Court is only required to act in an administrative capacity and not to exercise any judicial function. In support of this argument, he relies upon a Full Bench decision of this Court in 22 Lah. 395¹ in which it was held that a District Court is required only to act in an administrative capacity under the Musalman Wakf Act. That case, however, does not provide any true analogy, inasmuch as a District Judge is not required by the Musalman Wakf Act to do anything more than to act as a custodian of certain documents, and the real question in that case was whether he is entitled to hear and give a judicial determination on certain matters which he is not required by the Act to decide. In the present instance the Court concerned is required to hear both the parties and then decide whether a particular order should be maintained or not, which can presumably be done only after a judicial finding on the merits of the case.

Another case from this Court on which counsel relies, and to which reference has been made in the referring order, is that decided by Din Mohammad J. in F. A. O. No. 210 of 1940. This dealt with an order under S. 9, Insurance Act, the question being whether such orders could be regarded as subject to appeal under some general provision of law in spite of the fact that they are not made appealable under S. 110. In considering this question, it was remarked by the learned Judge that the order then under consideration appeared to him to be rather administrative than judicial and that it was possibly for this reason that the Legislature had not provided any appeal against it in the Insurance Act itself. It will be observed that this was only given as a possible reason why no appeal should have been allowed by the Act, and the possibility of revision was not considered. In a sense, orders of this kind deal with matters which are primarily administrative in their nature and it is an administrative order which the Court is called upon to set aside or confirm. But when an administrative order may involve interference with ordinary civil rights, it is by no means unusual for the Legislature to provide for some sort of appeal to a judicial forum, where the propriety of the order may be considered otherwise than from purely administrative standpoint. The propriety of an order refusing a revision under S. 9, Insurance Act, came up in revision before a Division Bench of the Calcutta High Court in 74 C. L. J. 491² and the petition was accepted. The power of the High Court to interfere in revision was not challenged in that case, although the party opposing the petition was represented by the Advocate-General of Bengal and other eminent counsel.

Although the point under discussion was not exactly the same, there are some relevant observations.

1. ('41) 28 A. I. R. 1941 Lah. 145 : 194 I. C. 851 : I.L.R. (1941) 22 Lah. 395 : 43 P.L.R. 208 (F. B.); *Shia Youngmen's Association, Punjab v. Fateh Ali Shah*.

2. ('42) 29 A.I.R. 1942 Cal. 294 : 201 I. C. 20 : I.L.R. (1942) 1 Cal. 481 : 74 C.L.J. 491 : 43 D.W.N. 284, *Navajiban Insurance Co. Ltd. v. Superintendent of Insurance, Govt. of India Dept. of Commerce, New Delhi*.

tions in the judgment of a Full Bench of the Patna High Court in A. I. R. 1941 Pat. 65,³ which deals with a number of previous decisions on the difficult question whether an authority appointed to perform certain functions under a special Act should be regarded as a Court or merely as a persona designata. The question then to be decided was whether a Commissioner appointed under the Workmen's Compensation Act was a Court or not, and it was decided that he was, in spite of the fact that the Act in question provided that he should be deemed to be a Court for certain purposes and that he should have all the powers of a Court for others. Among other matters, the judgment dealt with the position under the Land Acquisition Act, and reference was made to the distinction drawn by their Lordships of the Privy Council between administrative action of a Collector who has merely to make a decision binding only on himself and what happens when the assessment is referred for judicial determination to a Court. The position in this case does not seem to be very far different. The Superintendent of Insurance has to pass administrative orders which may or may not be eventually binding on the other party, but it is then open to the person affected to refer the matter himself to a Court for judicial determination by means of an application under S. 33 of the Act. The Full Bench left open the question whether the Commissioner should be regarded as a Court subordinate to the High Court, this question not having been argued before it; but if the District Court is to be held to be acting as a Court of civil jurisdiction in dealing with an application under S. 33, Insurance Act, there can hardly be any question that it is subordinate to the Court having jurisdiction to entertain appeals from other orders made by the same Court under the same Act.

References may also be made to 57 All. 810⁴ at p. 822 which dealt with the revisional jurisdiction of the High Court over District Courts under the Companies Act. It was found that the High Court had such jurisdiction and this finding was based on the decision of the Privy Council in 40 Mad. 793,⁵ holding that the High Court had jurisdiction to revise an order of the District Judge made under S. 10, Religious Endowments Act, and a Full Bench decision of the Allahabad High Court in 56 All. 656,⁶ regarding revisional jurisdiction under the Land Acquisition Act. There is also a relevant decision in I.L.R. (1938) Mad. 216,⁷ a case under the Madras Hindu Religious Endowments Act, which dealt with the question whether the District Court should be regarded as acting as a Court subject to the provisions of the Code of Civil Procedure. Finally, there is the well known observation of Lord Parker

in (1913) A. C. 546⁸ at page 562 :

"Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same."

The matter may be put in another way. One question that arises in cases of this kind is whether a certain function has been entrusted to a particular authority because that authority already possesses judicial powers which can be invoked for the purpose of deciding what orders should be made or whether the function is one which can be regarded as having been intended to be exercised without the use of any such powers. For instance, if it may prove necessary to take evidence on any particular point, a Court of civil jurisdiction already possesses such powers, and it becomes unnecessary to provide that the authority in question shall exercise the powers of a civil Court under the Act. It seems to us that the Court nominated in the present instance was so nominated because it already enjoyed the powers given to a civil Court under the Code of Civil Procedure. If use is to be made of these powers, however, the other provisions of the Code must also be applied, including the provisions for revision contained in S. 115, Civil P. C. Counsel for the Superintendent of Insurance next suggests that the power given to the District Court of issuing prohibitory order under S. 33, Insurance Act, is discretionary, so that the orders passed in the exercise of this power cannot be made the subject of revision. This may affect the merits of the present petition, but it is hardly a reason for holding that power to interfere in revision does not exist. The order which may be passed by the District Court is in the nature of an injunction or mandamus. The power to issue an injunction, in the ordinary way is always a matter of discretion, but this does not exclude the power of revision when there has been an irregularity in the exercise of jurisdiction.

With regard to the merits of the petition, it is necessary to set out the various stages of the proceedings. In reply to the application made by the Insurance Company to the District Court, the Superintendent of Insurance set out a number of reasons which had led him to order an investigation. Among other things, it was stated that the managing agents owed a sum of one and a half lacs to the Company, which they had failed to repay in spite of a statutory obligation to do so, that their present affairs were in a bad way, that the proportion of expenses to premium income shown in 1939 was exceptionally high, that the liabilities of the company amounted to about 11 lacs as against assets of the value of only a little more than five lacs, the assets of the company having been greatly over-valued. In answer to this, the company stated that the money due by the managing agents had been re-paid (the system of managing agency is said to have disappeared in the meantime), that the expenditure showed in 1939 was the result of exceptional circumstances, mainly due to the introduction of the new Insurance Act, that the position had greatly improved since then, and that they had unimpeachable assets to the value of about 14 lacs which would be more than enough to meet

3. (41) 28 A.I.R. 1941 Pat. 65 : 192 I. C. 217 : 20 Pat. 378 : 21 P.L.T. 1067 (F.B.), *Mt. Dirji v. Mt. Goalin*.

4. (85) 22 A.I.R. 1935 All. 810 : 156 I.C. 1088 : 57 All. 810 : 1935 A. L. J. 527, *British India Corporation Ltd. v. Shanti Narain*.

5. (17) 4 A. I. R. 1917 P. C. 71 : 40 I. C. 650 : 40 Mad. 793 : 44 I.A. 261 (P.C.), *Balkrishna Udayar v. Vasudeva Ayyar*.

6. (34) 21 A.I.R. 1934 All. 260 : 148 I.C. 617 : 56 All. 656 : 1934 A. L. J. 82 (F.B.), *Mekhan Lal v. Secy. of State*.

7. (37) 24 A. I. R. 1937 Mad. 658 : 172 I. C. 579 : (1937) 2 M. L. J. 175 : I. L. R. (1938) Mad. 216, *Marudamuthu Poesari v. Hindu Religious Endowments Board, Madras*.

8. (1913) 1913 A. C. 546 : 82 L.J.K.B. 1197 : 109 L. T. 562 : 57 S. J. 661 : 15 By. & Can. Traff. Cas. 109 : 29 T. L. R. 567, *National Telephone Co. Ltd. v. Post Master General* (No. 2).

a their obligations even if the Superintendent's figure for liabilities was accepted. These assets included Government securities, immovable property and loans to policy-holders. In a further reply, the Superintendent stated that he was not in a position to say whether it is correct that the position of the company had improved to the extent claimed by them, since he had not as yet received a copy of the new balance-sheet, over the issue of which there seems to have been some delay.

b This last statement by the Superintendent of Insurance was submitted on a date which had been fixed for arguments, 10th October 1941. He was then asked whether he was prepared to admit the documents on which reliance had been placed by the company. To this he replied at the next hearing that he was prepared to admit the execution of the documents, but not the correctness of their contents. This was on 18th October, when the Court passed an order that no oral evidence was necessary but that further documentary evidence could be put in by the company. On 5th November 1941, the company put in an affidavit by one of its officers, attaching a copy of the new balance sheet. To this, were attached various documents in support of the statements made by the company, such as bank letters to show the deposit of securities without encumbrance and expert valuations of immovable property. Arguments were finally heard on 19th January 1942 when the Court passed the following brief order :

"After listening the lengthy arguments and considering the facts on the file, I do not think that there is any occasion for interfering with the order which has been made against the petitioner by the Superintendent of Insurance."

c In cases of this kind, when it seems clear that the Act contemplates a summary enquiry before an order for a more thorough investigation is made, it would be unwise to lay down any rigorous rules of procedure or fetter in any way the discretion of the District Court in regard to matters as the nature of the evidence to be taken ; but it would still be more difficult to hold that this is a correct manner of disposing of an application under S. 33, Insurance Act. The final order should at least have given some indication of the matters substantially in dispute between the parties and the reasons for dismissing the application. It is not only the final order which is unsatisfactory, but also the manner of disposing of the case as a whole. Before it could be said whether it was necessary or not to have an investigation into the affairs of the company conducted by an actuary or auditor or both, it was clearly necessary to ascertain exactly over what points the parties were at issue and whether the grounds given by the superintendent for ordering such investigation were well founded or not ; but even now it is still not clear what exactly are the substantial points in issue, and on the material available it would be difficult, if not impossible, to arrive at any judicial determination on the merits. In fact it is difficult to understand what were the matters with which were concerned the lengthy arguments mentioned by the District Judge, which are said to have taken two days.

d Without prejudice to the case for the company, it may be said that the reasons given by the Superintendent of the Insurance might well have justified an order for investigation at the time when the order was made. The Superintendent was further justified in adopting a non-committal attitude before seeing the new balance sheet and the company had put in the documents mentioned above.

a Counsel for the Superintendent suggests that the Court had only to see whether there were any reasons for the District Judge's order at the time it was made, but it seems to us that the party affected by such an order is not limited to showing that the order was issued without good reason in the first instance, but is entitled to show that the reasons have disappeared and that there is no longer any necessity for an investigation from outside. At first sight, an order for investigation may seem harmless if the affairs of the company are in good order; but it has to be remembered that the carrying into effect of such an order may seriously affect its reputation and do harm to its business, more particularly when this is insurance business, even though the results of the investigation may prove satisfactory in the end. It is for this reason, presumably, that an insurance company is given a right of appeal to the District Court, so to speak; and before an application under S. 33, Insurance Act, can be dismissed there must at least be some serious attempts to see whether the party affected by the order has good reasons for opposing the investigation, even though it may be not possible to do more than conduct a summary inquiry.

This is exactly what does not appear to have been done in the present case. As already mentioned, there seem to have been three substantial grounds for ordering an investigation in the first instance, though it is not clear which of them is still being seriously pressed as a reason for maintaining the order of investigation at the present time. These were: (1) That the managing agents had failed to re-pay the loan due by them to the company; (2) That the balance-sheet for 1939 showed an unduly high proportion of expenditure ; and (3) That the assets had been greatly over-valued and were not sufficient to cover the liabilities of the company.

As regards the loan, this is said to have been repaid, and it should have been easy to ascertain whether this has been done or not without any lengthy inquiry, but it is difficult to see how the point can be cleared up if oral evidence is not to be heard and documentary evidence is not to be taken as correct. As regards the assets, the items mentioned should be capable of being satisfactorily assessed, but it is not clear how this is to be done at present or which of the items are still being seriously attacked. Even if the Superintendent was not in a position to give a definite statement on these points until the company put in its documents, it was open to the Court to examine the parties again and ascertain precisely which items were being seriously contested and what would be the most expeditious method of settling the dispute of fact. It was only when this had been done and such further evidence taken as might have been found necessary, that there would be scope for arguments.

h If all the objections raised by the Superintendent have been removed there would not seem to be any reason why investigation should still be considered necessary and we consider that steps should now be taken to ascertain whether the claim of the company to have removed these defects is correct or not. If the District Judge comes to the conclusion that there are any points which can only be satisfactorily cleared up by means of expert investigation, this might possibly be itself a reason for upholding the order; but the reason should at least be stated; and the application should not be dismissed until the company has had a reasonable opportunity of producing evidence in support of its claim. It may here be observed that merely to allow a party to put documents on the record without any means of proving

a their contents to be correct, when this is denied by the other side, does not amount to the taking of evidence in any true sense of the word and does not afford a basis for judicial determination.

For these reasons we consider that there has been an irregular exercise of jurisdiction in the present case. The petition is accordingly accepted, the order of dismissal is set aside and the proceedings will be returned to the District Court for further action. There will be no order for costs incurred in this Court and other costs will abide the event. Stamp fee on the petition will be refunded. Parties to appear in the District Court on 8th April 1942.

G.N./R.K.

Petition accepted.

A. I. R. (29) 1942 Lahore 271

TEK CHAND AND SALE JJ.

b *Ghulam Mohammad alias Gama s/o Bhag and others — Convicts*
Appellants

v.

Emperor.

Criminal Appeal No. 820 of 1942, Decided on 10th July 1942, from order of Sess. Judge, Gurdaspur, D/- 12th May 1942.

(a) Criminal trial — Confession—Confession is not involuntary or unlawfully induced merely because it was retracted at trial.

A confession regularly recorded by the Magistrate with the necessary formalities must not be regarded as involuntary or unlawfully induced merely because it was retracted at the trial. [P 273c, d]

c Cr. P. C. —

(41) Chitaley, S. 164, N. 18.

(41) Mitra, Page 521, N. 515; Page 537, N. 519A.

(b) Criminal trial—Confession—Maker can be convicted on retracted confession if found true —But it is unsafe to do so without independent corroboration.

As against the maker a retracted confession if believed to be true, may form the basis of a conviction; but as a rule of caution it is unsafe to base a conviction even of the maker on a retracted confession alone without some independent corroboration. [P 273e]

Cr. P. C. —

(41) Chitaley, S. 164, N. 18, Pt. 1.

(41) Mitra, Page 522, N. 515.

d (c) Criminal trial — Retracted confession by accused — Evidentiary value of, against co-accused — Higher standard of corroboration is necessary in case of retracted confession than in case of approver's testimony.

As against the co-accused a retracted confession by an accused may be taken into consideration subject, however, to the rule that it cannot form the basis of a conviction without substantial and independent corroboration both as to the crime and the criminal. Further as against the co-accused a higher standard of corroboration in regard to the retracted confession must be demanded than in the case of the testimony of an approver because the testimony of an approver can be tested by cross-examination whereas the confession of an accused cannot be subjected to such a test. [P 273e, f]

Cr. P. C. —

(41) Chitaley, S. 164, N. 18, Pt. 7.

(41) Mitra, Page 522, N. 515.

(d) Criminal trial — Confession — Confession if accepted must be accepted as whole — Effect must be given to that portion which indicates that accused acted under pressure — But this matter can only be considered by way of mitigation of sentence.

A confession, if accepted at all, should be accepted as a whole and not in part and therefore, effect must be given to that portion of the confession which indicates that the accused acted to some extent under pressure. This, however, is a matter that can only be taken into consideration by way of mitigation of sentence. [P 273g]

Cr. P. C. —

(41) Chitaley, S. 164, N. 7; S. 367, N. 6.

(41) Mitra, Page 537, N. 519A.

(e) Criminal trial — Evidence — Zimnis can be used only in favour of and not against accused.

The use of zimnis must be confined to eliciting circumstances favourable to the accused, and the Judge should not allow himself to be influenced against an accused person by reference to the zimnis. [P 275a]

(f) Criminal P. C. (1898), Ss. 236, 237—Penal Code, Ss. 201 and 302—Accused guilty of murder — Disposal of dead bodies by accused separate transaction from actual murder—Conviction under S. 201 in addition to under S. 302 is not illegal.

Where the disposal of the dead bodies by the accused who committed the murder is a separate transaction from the actual murder, the conviction of the accused under S. 201, Penal Code, in addition to the conviction under S. 302, Penal Code, is not illegal: (31) 18 A.I.R. 1931 Pat. 173 and (26) 18 A.I.R. 1928 All. 737, Ref. [P 275b, c]

Cr. P. C.—

(41) Chitaley, S. 236 N. 6 Pt. 2.

(41) Mitra, Page 837 N. 766.

(g) Criminal trial—Confession — Corroboration—Murder case—Confession by accused that he along with other accused committed murder—His account of murder corroborated by medical evidence and by finding of bodies — His information leading to recovery of spear and sword buried in field — Weapons not found stained with human blood — Fact that accused gave information leading to discovery of buried sword which there was no need to bury unless used for some guilty purpose held in circumstances of case was material corroboration of accused's confession.

The account of the murder given by the accused in his confession that he along with other accused committed the murder was corroborated by the medical evidence and by the finding of the bodies. His pagri was found to be bloodstained on arrest and he himself gave information leading to the recovery of a spear and a sword. Those weapons were not proved to be stained with human blood but they were discovered buried in a field.

Held that the fact that the accused did give information leading to the discovery of a buried sword which was in fact a kirpan—a weapon which there was no need to bury unless it was used for some guilty purpose was in the particular circumstances material corroboration of the confession. [P 275d]

(h) Criminal trial — Evidence—Corroboration
 a —Murder—Accused being found in possession of deceased's watch shortly after murder is strong corroboration of his participation in crime.

The fact that the accused was found in possession of the murdered man's watch shortly after the murder, affords strong corroboration of his participation in the crime. [P 274e, f]

B. R. Puri and J. L. Kapur — for Appellants.
 Ghulam Rasul Khan for Advocate-General — for the Crown.

SALE J.— Some time after sunset on the evening of 25th June 1941 two Jats Ganda Singh and Charan Singh were murdered near village Dabanwala in the Gurdaspur District. Six persons have been convicted by the learned Sessions Judge of Gurdaspur in connexion with these murders as follows : Ghulam Mohammad alias Gaman and Shafi Arains with Chanan Singh a Mazhabi under S. 302, Penal Code, for committing the murders ; and these three principals together with Mohammad Hussain and Nur Arains and Nika Teli, under S. 201, Penal Code, for causing the evidence of the commission of the offence, i.e., the bodies of the murdered persons, to disappear. Ghulam Mohammad, Shafi and Chanan Singh have been sentenced to death ; and all the accused including the principals to seven years' rigorous imprisonment under S. 201, Penal Code. From these convictions the accused have appealed, and the death sentences are before us for confirmation. Of the accused, Ghulam Mohammad and Nur are brothers; Mohammad Hussain is their nephew, being the son of one Din, their brother, who has been discharged by the Committing Magistrate. Ganda Singh deceased was a Sarpanch of the Panchayat of Dabanwala and Charan Singh deceased was a member of the Panchayat. It has been proved by the evidence of Tulsi Ram (P. W. 20) who keeps the Panchayat registers that all these accused (as well as their relations) had on various occasions been involved in cases before the Panchayat and had been fined. On 25th June 1941, that is, the date of the murder, proceedings for forfeiture of security were being taken in the Court of Mr. Kishan Chand Mathur, Resident Magistrate at Batala (P. W. 5) against Mohammad Shafi and Ghulam Mohammad accused and also against Din the discharged accused. Ganda Singh Sarpanch (deceased) was a prosecution witness in the case while Chanan Singh Mazhabi accused was a defence witness. It appears from the evidence of Gurbachan Singh, at that time Ahlmad of the Court of the Resident Magistrate, Batala, d (P. W. 6), that Charan Singh deceased was also present with Ganda Singh Sarpanch; and at about 5-30 P. M. when the parties were leaving the Court, he witnessed a quarrel between Ganda Singh and Charan Singh on the one side and the respondents and their witnesses on the other. At about 7-30 the same evening Charan Singh and Ganda Singh deceased came to see the Naib Tahsildar, Batala, when this witness Gurbachan Singh was present, to make some enquiries about a mutation. Ganda Singh had a bicycle and was carrying a kirpan. Ganda Singh and Charan Singh were not seen alive again.

For an account of their murders the only evidence is the retracted confession of Chanan Singh accused recorded by a First Class Magistrate on 4th July 1941. In this confession Chanan Singh states that after leaving the Court of the Magistrate to which he had gone as a defence witness for Mohammad Shafi and Ghulam Mohammad alias Gaman accused, he was walking home with Shafi and

Gaman when Shafi said that he would pick up a quarrel with Ganda Singh Sarpanch the same evening and requested Gaman and Chanan Singh to accompany him. Chanan Singh states that he tried to dissuade Shafi from this enterprise but under threat of being involved he agreed to accompany him. They then separated. Shortly after Chanan Singh had reached his house, Shafi and Gaman came to him armed with a kirpan and a gandasa respectively. Chanan Singh took a spear, and the three went towards a place known as Takia Panj Pir, which Ganda Singh Sarpanch was expected to pass, on his way back from Batala. The three awaited at Takia Panj Pir for something more than one pehr (i. e., about three hours) after nightfall when Ganda Singh accompanied by Charan Singh was seen to alight from a tonga and came along the pathway. As they approached, Chanan Singh said that he endeavoured to dissuade Shafi but on Shafi's insistence, he, Shafi and Gaman made a concerted attack on Charan Singh and Ganda Singh. Shafi cut off Charan Singh's head with a blow of his kirpan. Chanan Singh and Gaman struck blows on Ganda Singh with their weapons. When Ganda Singh was half dead, Shafi severed his head with the kirpan. Ghulam Mohammad took the head of Ganda Singh while Shafi picked up the head of Charan Singh. The heads were thrown into the canal in the vicinity. The bodies were dragged aside pending disposal. Thereafter, Chanan Singh, Gaman and Shafi went to the village for help and procured the assistance of Nika Teli, Mohammad Hussain and Nur. These six persons returned to the scene of occurrence with a spade and some ropes; the dead bodies were tied up and buried in a pit. Two of the weapons used, a spear and a kirpan, were buried and the gandasa was thrown into the canal. Chanan Singh says that an attempt was made by him to wash off bloodstains, by bathing in the canal.

Such is the confession. The matter rested until the 28th when owing to the continued disappearance of Ganda Singh and Charan Singh a report was made to the police by Labh Singh lambardar. Mention was made therein of the proceedings in the panchayat and before the Resident Magistrate, and the suspicion was recorded that Ganda Singh and Charan Singh had been the victims of a foul play. All the accused were arrested on 29th June 1941. On the same day, a head was seen floating in the canal distributory near village Chawinda Deviwalla in the Amritsar District. It is not clear how far away the place of this discovery is from the scene of the murder but the discovery seems to have been made independently of this arrest of the accused. This head has been identified by Sadhu Singh son of Ganda Singh (P. W. 14) as being that of the deceased Ganda Singh. This identification has not been questioned in appeal and need not, therefore, be further discussed.

As a result of interrogation, Shafi accused took the investigating Sub-Inspector and other witnesses to Takia Panj Pir and showed a place where blood-stained earth was found on the ground and also some blood-stained human hair. Specimens of these articles were taken possession of by the investigating Sub-Inspector, and were sent to the Chemical Examiner and Imperial Serologist; and they have been proved to be stained with human blood. The place in question was the scene of the murder. The headless bodies were discovered the next day, that is, 30th June, buried in a pit nearby, also at the instance of Mohammad Shafi accused. These bodies have been identified as those of Ganda Singh and Charan Singh. The identification evidence which

has been accepted by the learned Sessions Judge has not been questioned in appeal and need not be discussed. It is sufficient to say that the post mortem examination supports the account given in the retracted confession, of the way in which the murders were committed. In the case of Charan Singh, death was due to decapitation; and in the case of Ganda Singh there were a large number of incised injuries showing that the unfortunate man had been brutally done to death. The head had been severed by a number of blows and the eyeballs removed from their sockets.

The evidence against the accused consists of the retracted confession of Chanan Singh together with recoveries and discoveries effected at the instance of individual accused, and the recovery of blood-stained clothes from their persons. These discoveries will be discussed in detail for the purpose of determining how far each item corroborates the retracted confession of Chanan Singh and connects each individual accused with the crime. It is unnecessary to deal in detail with the evidence relating to the factum of each discovery and recovery, since this has not been challenged in appeal by Mr. Puri. He has confined his arguments to attacking the confession made and retracted by Chanan Singh, which he contends is of no evidential value except as against the maker himself. So far as the recoveries and discoveries are concerned, he contends that they are not sufficient to sustain the conviction for murder but at best they could only support a conviction under S. 201, Penal Code, against those accused who are shown to have been connected with the disposal of the bodies. In regard to two of the accused only, that is, Nika and Nur, it is contended that there is no evidence against them on which a conviction of any sort can be sustained. It will be necessary first to consider the retracted confession of Chanan Singh and the extent to which, if accepted as true, it can be used against the maker and his co-accused.

As already stated Chanan Singh was arrested on 29th June 1941. He is said to have made a statement to the investigating officer on 1st July (though the substance of this is not admissible) and made a regular confession, (the gist of which has already been given in this judgment), recorded by a Magistrate on 4th July. This confession was subsequently retracted by Chanan Singh alleging that he had made it under police pressure. As Mr. Puri admits, there is no evidence to show that Chanan Singh was subjected to police pressure. The confession was admittedly regularly recorded, all the necessary formalities being observed by the Magistrate. The confession is corroborated by such circumstantial evidence as is available in this case, in particular by the fact that when arrested the *pagri* (Ex. P. 9) which Chanan Singh was found to be wearing, was bloodstained and these stains have been established by the evidence of the Imperial Serologist to be human blood. In addition, on information given by Chanan Singh, a spear was recovered buried in the field of one Nika and a sword buried in the field of one Gaman on 1st July 1941, that is, three days before the confession was recorded by the Magistrate. The evidential value of these last two items would *per se* be small as they are not proved to be stained with human blood but it is significant that both weapons were found buried and these recoveries do corroborate the account of the murder given in the confession. The confession must not be regarded "as involuntary or unlawfully induced" merely because it was retracted at the trial, and in these circumstances we agree with the learned Ses-

sions Judge that the confession was made voluntarily and is in substance true.

The question now for consideration is the evidential value of this confession (a) against Chanan Singh himself and (b) against his co-accused. Now as against Chanan Singh the maker, a retracted confession, if believed to be true, may form the basis of a conviction, but as a rule of caution, it is unsafe to base a conviction even of the maker on a retracted confession alone without some independent corroboration. As against the co-accused, a retracted confession may be taken into consideration subject, however, to the rule which is now firmly established that it cannot form the basis of a conviction without substantial and independent corroboration both as to the crime and the criminal. Further, we agree with Mr. Puri that a higher standard of corroboration in regard to a retracted confession must be demanded than in the case of the testimony of an approver because the testimony of an approver can be tested by cross-examination whereas the confession of an accused cannot be subjected to such a test.

It is contended by Mr. Puri that in this case the statement of Chanan Singh is not a real confession but is of an exculpatory nature by reason of the fact that he has stated in the confession that he acted under pressure, so that whatever Chanan Singh has confessed to have done was not done as a voluntary act. We cannot accept this argument. It is true that Chanan Singh says that on two occasions, he tried to dissuade Shafi from this enterprise and that Shafi threatened to involve him if he refused. Nevertheless, the fact remains that on Shafi's insistence Chanan Singh says that he agreed; and when the conspirators attacked Chanan Singh and Ganda Singh, Chanan Singh admits striking Ganda Singh repeatedly with a spear until Ganda Singh was "half dead" after which Shafi gave the "*coup de grace*" by striking off his head as he had already struck off the head of Charan Singh. The confession, therefore, is complete in that Chanan Singh fully involves himself in the crime; and on his own showing he has committed an offence, which certainly amounts to the offence of murder. It is true that it is also an established rule of law that a confession, if accepted at all, should be accepted as a whole and not in part and that, therefore, effect must be given to that portion of the confession which indicates that Chanan Singh acted to some extent under pressure. This, however, is a matter that can only be taken into consideration by way of mitigation of sentence. For the rest we hold that the confession is complete in itself; it is true and genuine; and it may be taken into consideration not only against the maker but against his co-accused subject to the rule that there must be substantial and independent corroboration which in the case of the co-accused must be of a higher standard than would be demanded in the case of an approver.

We turn, therefore, to the question of corroboration. We are not impressed with the evidence of the one witness whose presence was discovered apparently as a result of Chanan Singh's statement, viz., Darshan Singh (P. W. 8). He purports to have seen Chanan Singh and Shafi armed with a spear and a kirpan respectively, proceeding with a third person ahead (whom he could not identify) armed with a gaddase, going in the direction of Takla Panj Pir at a time which must have been shortly before the murders. Apart from the fact that this evidence was recorded at a very late stage

a by the police, this man, who is a grazier, admits that he resides at a different village some nine or ten miles away; and though he says that at the material time he was grazing his goats in this particular area, it is impossible to hold that he was a likely sort of person to be present at that place and time, and to have seen Chanan Singh and Shafi as he now says. Moreover, he starts his evidence by saying "about ten months ago on the 25th of some English month" the use of this phrase itself tends to indicate that he is a tutored witness. But ignoring, for these reasons the evidence of P. W. 8 we hold there is sufficient corroboration of Chanan Singh's confession as against Chanan Singh himself. The motive as against Chanan Singh is established because he gave evidence for the Arain accused in the proceedings against Charan Singh and Ganda Singh before the Resident Magistrate at Batala on 25th June. He is certainly a partisan of the Arain accused and was, according to the evidence of the Reader and the Magistrate, involved with his companions in hot words with Ganda Singh and Charan Singh when leaving the Magistrate's Court on 25th June. His account of the murder is corroborated by the medical evidence and by the finding of the bodies. His pagri was found to be blood-stained on arrest and he himself gave information leading to the recovery of a spear and a sword. It is true that these weapons are not proved to be stained with human blood but they were discovered buried in a field and the fact that Chanan Singh did give information leading to the discovery of a buried sword which is in fact a kirpan a weapon which there was no need to bury unless it was used for some guilty purpose is in the particular circumstances material corroboration. We hold, therefore, c that Chanan Singh has been rightly convicted under S. 302, Penal Code.

Turning now to the case of Shafi, it has been established that he had a strong motive for the attack on Charan Singh and Ganda Singh because of the action taken against him and Gaman by the Panchayat and the fact that on the day of the murders proceedings were pending against him before the Resident Magistrate at Batala in which Charan Singh and Ganda Singh were prosecution witnesses. It is proved that on leaving the Magistrate's Court Shafi and Gaman were involved in a quarrel with Ganda Singh and Charan Singh. As regards the actual murders Shafi is given the leading part in Chanan Singh's confession. It was Shafi who seems to have organised the attack, and to have taken the leading part by decapitating the d victims. The scene of the murder was discovered on information given to the police by Shafi and two headless bodies were recovered buried in a place not far off, again on information given by Shafi. In addition, the safa worn by Shafi at the time of his arrest has been proved to be stained with human blood, there being on it no less than 65 such blood-stains. This evidence affords strong corroboration of the participation of Shafi in the murders and we hold that he, too, has been rightly convicted under S. 302, Penal Code.

As against Ghulam Mohammad alias Gaman, it is established that when he was arrested he was found to be suffering from a severe cut on the ankle, of which he has given no satisfactory explanation. He admitted, however, that he received this cut on 25th June but has given discrepant and unsatisfactory explanations as to how he received this cut. The medical evidence shows that the cut was of considerable severity 2" x 1" x 1" and was septic when examined. Gaman is alleged to have been

armed with a gandasa and this is just the sort of cut that he might have received in the attack on the two victims one of whom had a kirpan. His clothes, too, were suspected to be stained with human blood but the stains were found by the Imperial Serologist to be disintegrated and their origin is not established. This evidence cannot, therefore, be used as good corroboration against him. But the important thing is that on information given by Gaman a watch was recovered from his house, which bears the name engraved on its back "Charan Singh, Jat, Dabanwala, 7th May 1940." The identity of this watch as the property of Charan Singh deceased is thus well established and is not questioned in appeal. Mr. Puri can only suggest that somebody might have given this watch to Gaman. It could hardly have been Charan Singh himself and we consider the fact that Gaman was found in possession of the murdered man's watch shortly after the murder, affords strong corroboration of his participation in the crime. We hold, therefore, that the guilt of Gaman has also been established under S. 302, Penal Code.

This completes the convictions under S. 302 and we now turn to those accused who have been convicted only under S. 201, Penal Code, that is to say, Mohammad Hussain, Nika and Nur. The conviction of Mohammad Hussain under S. 201 is not seriously challenged. The part attributed to him in Charan Singh's confession is corroborated by the fact that his clothing, on arrest, was proved to be stained with human blood. In addition, on information given by Mohammad Hussain, the bicycle of Charan Singh was recovered from a well. The identity of this bicycle as the property of Charan Singh has been fully established and the evidence is not contested in appeal. The fact that Charan Singh had a bicycle at the time of his murder is mentioned by Chanan Singh in his confession. We hold that these proved facts are corroboration of the confession of Chanan Singh that Mohammad Hussain took part in the disposal of the bodies and we, therefore, maintain his conviction under S. 201, Penal Code.

As regards Nika, the evidence of corroboration is not so satisfactory. The main items of corroboration alleged against him are (1) bloodstained clothes and (2) the production of a kirpan identified as that of Ganda Singh. The stains on the clothes, however, have not been proved to be human blood. The circumstances attending the production of the kirpan which, it is true, has been identified as that of Ganda Singh, are peculiar. This kirpan was recovered on information given by Nika from the house of a widow Mt. Biri (P. W. 31). This witness, however, cannot explain how and when the kirpan came to be placed in her house. She admits she always keeps the doors of her house open and it is clear from her evidence that anybody might have placed it there. All, therefore, that the production of the kirpan from her house proves against Nika is that he knew that Ganda Singh's kirpan had been hidden somewhere in Mt. Biri's house. It is true that in the confession the fact that Ganda Singh had a kirpan is mentioned, but nothing is said as to its disposal nor is there any mention of the fact that Nika took the kirpan. In these circumstances we cannot hold that the recovery of the kirpan affords any corroboration of the confession of Chanan Singh as against Nika. We must, therefore, give Nika the benefit of doubt and acquit him. As against Nur, there is admittedly no corroboration whatsoever as against him of the part attributed to him by Chanan Singh and Mr. Ghulam Rasool

frankly concedes that he is unable to support his conviction. The learned Sessions Judge appears to have used the zimnis for obtaining negative corroboration as against this accused, viz., the fact that Nur's counsel omitted to bring on record evidence to disconnect Nur with the crime. The learned Sessions Judge says that he is entitled by law to refer to this evidence, but the use made of the zimnis must be confined to eliciting circumstances favourable to the accused, and the Judge should not allow himself to be influenced against an accused person by reference to the zimnis. We hold, therefore, that in the absence of corroborative evidence Nur must be given the benefit of doubt and acquitted.

There is one other point which requires mention. The learned Sessions Judge has convicted the principal offenders Shafi, Gaman and Chanan Singh under S. 201 as well as S. 302, Penal Code. There is no doubt ample evidence that the murderers, subsequently assisted in the disposal of the bodies of their victims. The question whether such a double conviction is legal has been the subject of some conflict of authority. A Division Bench of the Patna High Court in 10 Pat. 140¹ held that S. 201 does not relate to the principal offender but to persons other than the actual criminal who, by causing the evidence of the offence to disappear, assist the principal to escape the consequences of his crime. This view was not approved in a Division Bench of the Allahabad Court, reported in 49 All. 57.² We do not propose in this case to enter into this controversy because as pointed out by the learned Judges in 49 All. 57² the question, so far as the principal offenders in this case are concerned, is obviously academic. But as the disposal of the bodies was in this case obviously a separate transaction from the actual murders, we are not disposed to think that the conviction of the principal offenders under S. 201 in addition to the conviction under S. 302 is illegal. We, therefore, maintain their convictions under S. 201 but we do not impose any separate sentence under that section.

The result is that the convictions of Shafi, Ghulam Mohammad alias Gaman and Chanan Singh are maintained under S. 302 and under S. 201, Penal Code. As regards sentence, the death penalty in the case of Shafi and Gaman is clearly appropriate and is confirmed, and their appeals are dismissed. In the case of Chanan Singh we accept the plea in his confession that he acted under the influence of, and as a result of pressure from, Shafi. Chanan Singh is a Mazhabi Chuhra and is likely to have acted, as he says, under the influence of the Arain accused. We do not, therefore, confirm the sentence of death in his case but commute it to transportation for life. To this extent his appeal is accepted. As regards Mohammad Hussain whose conviction we maintain under S. 201, we confirm the sentence of seven years' rigorous imprisonment and dismiss his appeal. For reasons already given the appeals of Nika and Nur are accepted and both are acquitted.

G.N./R.K.

Order accordingly.

1. ('31) 18 A. I. R. 1981 Pat. 172 : 132 I. C. 876 : 32 Cr. L. J. 975 : 10 Pat. 140 : 12 P. L. T. 746, *Rup Narain Kurmi v. Emperor*.
2. ('26) 13 A. I. R. 1926 All. 787 : 97 I. C. 44 : 27 Cr. L. J. 1068 : 49 All. 57 : 24 A. L. J. 958, *Emperor v. Har Piar*.

* A. I. R. (29) 1942 Lahore 275

FULL BENCH

TEK CHAND, BHAIDE AND SALE JJ.

Mela Ram, Proprietor of Firm Mela Ram and Sons—Decree-holder — Appellant

v.

Firm Ram Das Joshi and Sons through Jagat Ram etc., and others—Objectors — Respondents.

Exn. First Appeal No. 254 of 1941, Decided on 16th July 1942, referred to Full Bench by Tek Chand and Beckett JJ., D/- 20th May 1942.

(a) Civil P. C. (1908), Ss. 47 and 115 — Sale of house by judgment-debtor — Decree-holder applying for attachment of amount left with vendee for payment to vendor's creditors — Court ordering vendee to pay amount left with him to vendor's creditors within certain time or to deposit it into Court — Appeal by decree-holder—Judgment-debtor, vendee and vendor's creditors impleaded as respondents — Appeal held lay against judgment-debtor only—Appeal held may be treated as revision as against vendor's creditors (Per Tek Chand J. in Order of Reference).

The judgment-debtor sold a house belonging to him for Rs. 5000 out of which Rs. 2110 were left with the vendee for payment to the vendor's creditors. On the application of the decree-holder for attachment of the amount left with the vendee, the Court rejected the objections raised by the judgment-debtor, the vendee and vendor's creditors and ordered the vendee to pay the sum of Rs. 2110 to the creditors of the vendor within a certain period and to produce their receipts or to deposit the amount in Court. The decree-holder appealed impleading the judgment-debtors, the vendee and the vendor's creditors as respondents :

Held that the appeal clearly lay against the judgment-debtor and not against his creditors who were not parties to the suit in which the decree sought to be executed was passed and therefore the appeal may be treated as a revision as against them. [P 277b]

C. P. C. —

('40) Chitale, S. 47 N. 84, N. 87; S. 115 N. 19 Pt. 1.

('41) Mulla, Page 198 Note "Appeal;" Page 409 Pt. (f).

(b) Vendor and vendee — Part of purchase price left with vendee with instructions to vendee to pay same to vendor's creditors — Vendor can revoke instructions and require money to be paid to him except under special circumstances — Special circumstances indicated (Per Tek Chand J. in Order of Reference).

The mere circumstance that the vendor has given instructions to the vendee to pay the amount of purchase price left with him to named persons does not debar the vendor from revoking those instructions and requiring that the amount be paid to himself, except under certain special circumstances as when the person to be paid has a charge on the property sold which had to be redeemed with a part of the sale consideration so that the vendee might get the property free from encumbrances. [P 277c,d]

(c) Transfer of Property Act (1882), S. 55 (4) — Vendor can enforce his charge for unpaid purchase price on property sold against vendee personally — Principle of S. 55 (4) applies to Punjab (Per Full Bench).

On the completion of the sale transaction, the vendor automatically acquires a charge for the unpaid purchase price on the property sold and he can also enforce it personally against the vendee. This charge is analogous to the unpaid vendor's lien in English law and in India it has received statutory recognition in S. 55 (4), the principle of which is applicable to the Punjab. [P 278c]

T. P. Act —

('36) Mulla, Page 308 Note "Enforcement."

('34) Mitra, Page 277 N. 311A.

(d) Vendor and vendee — Part of purchase money left with vendee for payment to vendor's creditors — Vendee does not hold amount in trust for creditors — There being no privity of contract creditors cannot sue vendee for that amount (Per Full Bench).

b Where a portion of the purchase price is left with the vendee for payment to the creditors of the vendor the vendee does not hold the amount in trust for those creditors and as there is no privity of contract between them and the vendee they cannot sue him for its recovery: ('35) 22 A.I.R. 1935 Lah. 354, Rel. on. [P 278c]

T. P. Act —

('36) Mulla, Page 301 Note "S. 55 (4) (b)—Seller's charge for unpaid price."

('34) Mitra, Page 276 N. 311.

(e) Transfer of Property Act (1882), S. 55 (4) — Vendor's charge for unpaid purchase price is not excluded by mere personal covenant to defer payment of portion of purchase price or to take it by instalments — Charge subsists in spite of direction that amount should be paid to vendor's creditors (Per Full Bench).

The vendor's charge for the unpaid purchase price over the property sold is not excluded by a mere personal covenant to defer payment of a portion of the purchase money or to take it by instalments. The charge subsists even though the vendor has directed that the amount be paid to his creditors or other nominees: ('18) 5 A. I. R. 1918 Mad. 1045 (F.B.) and ('33) 20 A. I. R. 1933 Oudh 33, Rel. on. [P 278d]

T. P. Act —

('36) Mulla, Page 301 Note "S. 55 (4) (b)—"Seller's charge for unpaid price."

('34) Mitra, Page 274 N. 311.

(f) Civil P. C. (1908), S. 60 and O. 21, R. 46— Word "debt" in S. 60 and O. 21, R. 46—Meaning (Per Full Bench).

a The word "debt" in S. 60 and O. 21, R. 46 means a sum of money which is now payable or will become payable in the future by reason of a present obligation. It is an actually existing debt, i. e., a perfected and absolute debt; not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not arise: 27 Cal. 88 and ('41) 28 A.I.R. 1941 Rang. 256, Rel. on. [P 278e, f]

C. P. C. —

('40) Chitaley, S. 60 N. 7 Pts. 1, 2; O. 21, R. 46, N. 2 Pt. 1.

('41) Mulla, Page 241 Pts. (x), (y); Page 311 Pt. (h).

* (g) Civil P. C. (1908), S. 60 and O. 21, R. 46 — Unpaid purchase price left with vendee is "debt" due by him to vendor within S. 60 and O. 21, R. 46— Vendor's decree-holder can attach it immediately after completion of sale — Fact

that it is payable at future date or to third party e makes no difference (Per Full Bench).

The unpaid purchase price is the vendor's money in the hands of the vendee, which he is under an obligation to pay to the vendor and in the absence of a contract to the contrary, this obligation arises at the moment the sale transaction is completed. The fact that the money is, by agreement, made payable at a future date or that the vendor has asked the vendee to pay it to a third party makes no difference. It is none the less an existing and completed obligation and as regards it, the relationship between the vendor and the vendee is that of a creditor and debtor. The sum left with the vendee out of the purchase price for payment to creditors of the vendor but which the vendee has not actually paid to them is a 'debt' due by the vendee to the vendor within the meaning of S. 60 and O. 21, R. 46: (1933) 1 K. B. 47, Rel. on. [P 278e, f]

The decree-holder of the vendor can attach the unpaid purchase money left with the vendee immediately after the execution of the sale deed; and need not wait until "reasonable time" has elapsed from the sale and the vendee has omitted to pay the vendor's creditors within that time: ('37) 24 A.I.R. 1937 Lah. 608; 23 Mad. 441; 6 C. L. J. 398 and ('31) 18 A. I. R. 1931 All. 95, Disting. [P 278b; P 279 a, b]

Therefore if at the instance of a person who holds a decree against the vendor a prohibitory order under O. 21, R. 46 is served on the vendee, before he has paid out the amount to the nominees of the vendor in accordance with the directions set out in the sale deed, the attachment is good and neither the vendee nor the vendor can object. The vendor's nominees have no locus standi to object for, there is no privity of contract between them and the vendor, and the mere direction of the vendor to the vendee to pay the amount to them which is ordinarily revocable at any time before payment has actually been made creates no jural relationship between them. [P 278g]

C. P. C. —

('40) Chitaley, S. 60 N. 7 Pt. 4.

('41) Mulla, Page 311 Note "Attachment of debt."

Asa Ram Aggarwal — for Appellant.

Darbari Lal and Shamair Chand — for Respondents (Trader's Bank Ltd., Ludhiana; and Dhani Ram, Gian Chand and Faquir Chand, respectively).

ORDER OF REFERENCE, (Tek Chand and Beckett JJ., D/- 20th May 1942.)

h Tek Chand J. — On 19th March 1941, Mela Ram appellant obtained a decree on the basis of an award against firm Ram Das Joshi & Sons for Rs. 11276.4-0 payable on or before 13th April 1941, failing which the judgment-debtor firm was made liable to pay Rs. 15,000 to the decree-holder. It was also provided that until the payment of the decretal amount the judgment-debtors would not alienate any part of their property. On 7th April 1941 within three weeks of the decree, however, the judgment-debtors transferred by a registered sale-deed a house belonging to them to Achhru Ram for Rs. 5000. Out of the sale-price Rs. 2110 was left in deposit with the vendee for payment to five creditors of the vendors, namely, Dhani Ram, Gian Chand, Faquir Chand, Sham Lal and the Trader's Bank, to whom various sums were stated to be due by them. A week later, on 15th April 1941, the decree-holder, Mela Ram, took out execution of the decree and applied for attachment of the amount which had been left in deposit with the vendee

a Achhru Ram for payment to the creditors aforesaid. The executing Court attached the amount and issued prohibitory orders to the vendee not to pay the amount or any part of it to the creditors, and also to the creditors not to receive it as it had been attached. The vendee, the judgment-debtors and the creditors filed separate objections, pleading that the amount in question was not a "debt" and, therefore, not liable to attachment under O. 21, R. 46, Civil P. C. The executing Court, following A.I.R. 1937 Lah. 608,¹ held that as reasonable time had not passed after the execution of the sale to enable the vendee to pay the prior creditors, the amount left in deposit with the vendee was not attachable "at present." He further passed an order directing the vendee to pay to the creditors the money, which had been left with him within 15 days and produce their receipts or to deposit the amount in Court. The attaching decree-holder Mela Ram has appealed and the judgment-debtor the vendee and the prior creditors have all been impleaded as respondents in the appeal.

A preliminary objection is raised on behalf of Dhani Ram, Gian Chand, Faqir Chand and the Traders Bank that no appeal lay against them as they were not parties to the suit; and the decision so far as they are concerned did not fall within the purview of S. 47 and did not amount to a decree. Mr. Asa Ram, however, prays that this may be treated as a petition for revision against these respondents, as the appeal clearly lies against the judgment-debtors Ram Das Joshi and sons, who also had raised the same objection. This is a reasonable prayer and we grant it. It is common ground that where a portion of the purchase price is left with the vendee for payment to prior creditors of the vendor, the vendee does not hold the money in trust for these creditors; and there being no privity of contract between them and the vendee they cannot sue him for recovery of the amount. This has been laid down in a series of cases, of which the latest is 16 Lah. 118.² It is also well-settled that on the completion of the sale the ownership of the property passes to the vendee but the vendor has a lien on the property sold for the unpaid portion of the sale price and that the vendor can enforce this lien not only against the property but also against the vendee personally. The vendee is under an obligation to pay the balance of the sale-price to the vendor or to his nominee in accordance with the terms of the conveyance. The mere circumstance that he has given instructions to the vendee to pay the amount to named persons does not debar the vendor from revoking these instructions and requiring that the amount be paid to himself, except under certain special circumstances as when the person to be paid has a charge on the property sold which had to be redeemed with a part of the sale consideration so that the vendee might get the property free from encumbrances. It was not denied by counsel for the respondent that the unpaid sale consideration is the vendor's money which the vendee is under an obligation to pay. The question, however, is whether this obligation is a "debt" within the meaning of S. 80, Civil P. C., and is attachable as the vendor's property by a creditor of his under O. 21, R. 46. "Debt" is not defined in the

Code but it has been judicially interpreted to mean, in these provisions of the Code and similar provisions in the English law, as an "actually existing debt, that is, a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen"; 27 Cal. 38³ and A. I. R. 1941 Rang. 256.⁴

Applying this test to the unpaid sale consideration left with the vendee, it has been held that money which has been left with the vendee for payment to nominees of the vendor is a "debt" which is liable to be attached by a creditor of the vendor under O. 21, R. 46. In some cases, however, it has been held that the obligation matures after reasonable time has elapsed from the date of the sale or the date when the amount was payable to the vendor's nominees and that until such time has expired the amount cannot be attached. The present is a case of this kind. Here the sale-deed was executed on 7th April 1941 when a part of the sale-price was left with the vendee for payment to certain named creditors of the vendor. These instructions had not been withdrawn and the vendee had not had sufficient time to trace and pay the creditors before the prohibitory order was issued on 15th April. The lower Court following A. I. R. 1937 Lah. 608¹ has held that as reasonable time had not elapsed after the sale the amount was not liable to attachment forthwith. The correctness of this view has been assailed by the appellants' learned counsel and it has been strenuously urged that there is no justification in law for this distinction. This contention does not appear to be without judicial support. On the other hand, there are cases in which the same view has been taken as in A. I. R. 1937 Lah. 608¹; see 23 Mad. 441⁵ at p. 444; 52 All. 761⁶ at pp. 764-65 and 6 C. L. J. 398⁷ at p. 402. The question is of great importance and not free from difficulty and we think should be authoritatively settled by a larger Bench. We, accordingly, refer the case to a Full Bench. The papers shall be laid before the Hon'ble Chief Justice for constituting the Full Bench. An early date in the third week of June, if possible, should be fixed.

JUDGMENT OF FULL BENCH

TEK CHAND J.—The facts of the case which has given rise to this reference to the Full Bench and the questions of law involved are set out in detail in the referring order and it is only necessary to recapitulate them very briefly. By a deed, executed and registered on 7th April 1941, the respondent firm Ram Das Joshi & Sons, sold a house to Achhru Ram respondent for Rs. 5000. Out of the consideration for the sale, Rs. 2110 was left with the vendee for payment to five named creditors of the vendor, to whom various sums were stated to be separately due by him. A week later, on 15th April 1941, Mela Ram appellant who held a money decree for a large sum against the vendor (firm Ram Das

1. ('37) 24 A. I. R. 1937 Lah. 608 : 172 L.C. 438 : 39 P. L. R. 201, Gujjar-mal-Kundan Lal Firm v. Firm Parasram Sundar Lal.

2. ('35) 22 A. I. R. 1935 Lah. 354 : 153 I. C. 387 : 16 Lah. 118 : 37 P. L. R. 552, Ganesh Das v. Banio.

3. (1900) 27 Cal. 38 : 4 C. W. N. 87, Hari Das Achariya v. Baroda Kishore.

4. ('41) 28 A.I.R. 1941 Rang. 256, Secretary, Burma Oil Subsidiary Provident Fund (India) Ltd. v. Dadibhar Singh.

5. (1900) 23 Mad. 441, Doraisinga Tever v. Arunachalam Chetti.

6. ('31) 18 A.I.R. 1931 All. 95 : 124 I. C. 784 : 52 All. 761 : 1930 A. L. J. 1141, Sheopati Singh v. Jagdeo Singh.

7. ('07) 6 C.L.J. 398, Deswant Singh v. Syed Shah Ramjan Ali.

a Joshi & Sons) took out execution of that decree and applied for attachment of the sum of Rs. 2110 which had been left with Achhru Ram out of the purchase price of the house for the aforesaid purpose. The executing Court attached the amount and issued orders prohibiting Achhru Ram from paying it to the vendor or his creditors, and prohibiting the creditors from receiving it. The vendee, the vendor and the creditors filed objections that the amount in question was not a "debt" and was not liable to attachment under S. 60 and O. 21, R. 46, Civil P. C. The executing Court, purporting to follow a Single Bench ruling of this Court in A.I.R. 1937 Lah. 608,¹ held that as "reasonable time" from the date of the sale had not elapsed within which the vendee could pay the creditors named in the deed, the amount left with him was not attachable "at present" but that if the vendee failed to pay the creditors within 15 days from the date of the order, the attaching decree-holder, Mela Ram, would be entitled to recover it from him. The questions for consideration are : (1) whether the sum of Rs. 2110 left with the vendee out of the purchase price for payment to creditors of the vendor but which the vendee has not actually paid to them is a "debt" due by the vendee to the vendor, and (2) if so, whether a decree-holder of the vendor can attach it immediately after the execution of the sale deed, or will he be entitled to do so only after "reasonable time" has elapsed from the sale and within such time the vendee has omitted to pay the creditors.

The first question has been discussed at length in the referring order and as the learned counsel appearing for the various respondents have not seriously challenged the correctness of the view expressed therein it is not necessary to repeat all that has been stated there. It was conceded by counsel that where a portion of the purchase price is left with the vendee for payment to the creditors of the vendor, the vendee does not hold the amount in trust for these creditors and as there is no privity of contract between them and the vendee they cannot sue him for its recovery (16 Lah. 1182). It is also admitted that on the completion of the sale transaction, the vendor automatically acquires a charge for the unpaid purchase price on the property sold and that he can also enforce it personally against the vendee. This charge is analogous to the unpaid vendor's lien in English law, and in this country it has received statutory recognition in S 55 (4), T. P. Act, the principle of which has been held applicable to this province. Again, there is the high authority of the Lordships of the Privy Council for the proposition that the vendor's charge for the unpaid purchase price over the property sold is not excluded by a mere personal covenant to defer payment of a portion of the purchase money or to take it by instalments: 31 Cal. 57.² It is equally well settled, that the charge subsists even though the vendor has directed that the amount be paid to his creditors or other nominees: 39 Mad. 997³ and 8 Luck. 185⁴ It was pointed out in the former case that "the charge is over the purchase money and it is immaterial that the money is not directly payable to the purchaser" (p. 1003) and that "the purchase price does

not lose its character by the direction given by the vendor to the vendee at the time of the sale that the amount is to be paid to a third party" (p. 1003).

It is thus clear that the unpaid purchase price is the vendor's money in the hands of the vendee, which he is under an obligation to pay to the vendor and in the absence of a contract to the contrary, this obligation arises at the moment the sale transaction is completed. It is also clear that, the fact that the money is, by agreement, made payable at a future date or that the vendor has asked the vendee to pay it to a third party makes no difference. It is nonetheless an existing and completed obligation and, as regards it, the relationship between the vendor and the vendee is that of a creditor and debtor. The word "debt" is not defined in the Code. But, as pointed out in the referring order, it has been judicially interpreted as meaning "a sum of money which is now payable or will become payable in the future by reason of a present obligation;" "an actually existing debt i.e., a perfected and absolute debt; not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not arise:" 27 Cal. 383 and A.I.R. 1941 Rang. 256.⁴ Applying this test there can be no doubt that the unpaid purchase price left with the vendee is a "debt" due by him to the vendor. Under S. 60 of the Code, a 'debt' is one of the particulars which is liable to attachment in execution of a money decree, and O. 21, R. 46 prescribes the mode in which the attachment is effected. It is laid down in this rule that the attachment of a debt, not secured by a negotiable instrument, should be made by a written order prohibiting the creditor from receiving the debt and the debtor from making payment thereof until further order of the Court. If, at the instance of a person who holds a decree against the vendor, such a prohibitory order is served on the vendee, before he has paid out the amount to the nominees of the vendor in accordance with the directions set out in the deed, the attachment is good and neither the vendee nor the vendor can object. The vendor's nominees, of course, have no locus standi to object for, as pointed out above, there is no privity of contract between them and the vendor, and the mere direction of the vendor to the vendee to pay the amount to them creates no jural relationship between them. The direction is, ordinarily, revocable at any time before payment has actually been made.

In this connexion it will be useful to refer to the case in *Rekstin v. Severo Sibirsko and the Bank for Russian Trade* decided by the Court of appeal in 1932 and reported in (1933) 1 K.B. 47.¹¹ In that case, respondent 1 had a current account with respondent 2, the Bank for Russian Trade Ltd. On a particular date respondent 1 instructed the bank to transfer their current account to another body, to whom they owed nothing, and to close their account. The transaction was duly entered in the bank's books, but before notice had been given to the proposed transferees or the transfer accepted by them, a garnishee order nisi (which corresponds to the prohibition order issued under O. 21, R. 46 in this country) at the instance of the appellant, Rekstin, who held a decree against respondent 1, was served on the bank. It was held that "at the time of service the relation of banker and customer still existed between the bank and the judgment-debtors, and that a debt from the bank to the judgment-debtors

8. (1904) 31 Cal. 57 : 30 I. A. 238 : 8 C. W. N. 41 (P.C.), *Webb v. Macpherson*.

9. (1918) 5 A.I.R. 1918 Mad. 1045 : 37 I.C. 429 : 39 Mad. 997 : 31 M. L. J. 539 (F.B.), *Sivasubramania Ayyar v. Subramania Ayyar*.

10. (1938) 20 A.I.R. 1938 Oudh 35 : 141 I. C. 463 : 8 Luck. 185 : 2 C.W.N. 1032, *Danabai Ram v. Indar*.

11. (1932) 1 K.B. 47 : 103 L.J.K.B. 16 : 137 L. T. 231 : 76 S.J. 494 : 48 T.L.R. 575.

was due, upon which the order nisi could operate. The instruction given by the judgment-debtor to the bank was still revocable at the time when the garnishee order nisi was served, and that order operated in law as a revocation." The first question, therefore, must be answered in favour of the appellant decree-holder.

On the second question the contention of the respondents is that even though the unpaid purchase-price be deemed to be a debt, it is not attachable until the lapse of "reasonable time" from the sale, within which the vendee could have paid, but has neglected to pay, the vendor's nominees. Counsel have not been able to cite any authority bearing on the point, and the rulings mentioned in the referring order do not lay down any such proposition (*A. I. R. 1937 Lah. 608*, 128 *Mad. 441* at p. 444, 6 *C.L.J. 398* at p. 402 and 52 *All. 761* at pp. 764-65). They all were cases in which the vendee had neglected to pay the unpaid portion of the purchase price in accordance with the conditions laid down in the sale deed for a considerable period and the vendor had sued him for damages and it was held that the suit was competent as the vendee had neglected to comply with the conditions within a reasonable time. The second question, also, must be answered in favour of the appellant. It follows that the decision of the lower Court that the sum of Rs. 2110 aforesaid was not attachable by the appellant "at present" is erroneous, and that he was not right in giving the vendee 15 days' time to pay the amount to the vendor's creditors. As no other question arises, this appeal must be accepted, the order of the lower Court set aside and the case remitted to it for disposal in accordance with law. In the circumstances the proper order as to costs is to leave each party to bear the costs incurred by him so far. Counsel have been directed to cause their clients to appear before the lower Court on 17th August 1942, when a date for further proceedings will be fixed.

BHIDE J. — I agree.

SALE J. — I agree.

G.N./R.K.

Appeal accepted.

* A. I. R. (29) 1942 Lahore 279

TEK CHAND AND BECKETT JJ.

Dina Nath — Plaintiff — Petitioner

v.

Sant Ram and others — Defendants — Respondents.

Civil Misc. Nos. 117/C and 118/C of 1940, Decided on 28th March 1941.

* Civil P. C. (1908), S. 112 (b) and O. 45, R. 7 — Privy Council Rules (1920), R. 9 — R. 9 prevails over O. 45, R. 7 and High Court can extend period for deposit beyond six weeks from grant of certificate.

There being a conflict between O. 45, R. 7 and R. 9 of the Privy Council Rules the latter prevails. Hence the High Court can for cogent reasons, extend the time for making the deposit beyond six weeks from the grant of the certificate. (Poverty or inability to raise funds held no cogent reason): ('85) 22 *A. I. R. 1935 Lah. 733, Dissent.*; ('88) 25 *A. I. R. 1938 Lah. 725*; ('38) 25 *A. I. R. 1938 Mad. 796* (F. B.); ('39) 26 *A. I. R. 1939 All. 299* (F. B.) and ('37) 14 *A. I. R. 1937 Bom. 217* (F. B.), *Rel. on.* [P 279h; P 280g]

C. P. C. —

('40) *Chitale, O. 45 R. 7, N. 7 Pt. 8.*

('41) *Mulla, Page 1214 Pt. (g) and Page 1215 Pt. (m).*

Dev Raj Sawhney — for Petitioner.

M. C. Mahajan — for Respondents.

TEK CHAND J. — This order will dispose of Civil Miscellaneous Nos. 117/C and 118/C of 1940. The petitioners in these cases were defendants and plaintiffs respectively in a suit for dissolution of partnership and rendition of accounts. The appeals arising from that suit were finally decided by our judgment and decree of 8th July 1940. Both parties being dissatisfied with that decree applied for leave to appeal to His Majesty in Council. These applications were granted by us on 12th February 1941. Rule 7 of O. 45, Civil P. C., requires the petitioner to deposit security—(a) within ninety days, or such further period, not exceeding sixty days, as the Court may upon cause shown allow, from the date of the decree complained of, or (b) within six weeks from the date of the grant of the certificate, whichever is the later date. The decree was passed more than eight months ago and, therefore, the first part of the rule does not apply. Six weeks from the date of the certificate expired on the 25th of this month. Before that date, however, both parties had applied for extension of time. The first question to be decided is whether this Court has the power to extend time for making the deposit beyond six weeks from the date of the grant of the certificate. Rule 7 of O. 45, Civil P. C., was amended by Act XXVI of 1920, and on the wording of the amended rule it is clear that the period of six weeks from the date of the certificate cannot be extended. But under S. 112 (b), Civil P. C., the provisions of the Code are subject to the rules made by the Judicial Committee of the Privy Council for prosecution of appeals to His Majesty in Council. The rules framed by the Judicial Committee relating to Privy Council appeals, now in force, are contained in His Majesty's Order-in-Council promulgated on 9th February 1920 (printed in Chap. 8-B of Vol. V of R. & O. of the Lahore High Court). Rule 9 of these rules is as follows:

"Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal), the Court may on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such directions as to the costs of the appeal, and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires."

This rule clearly gives the High Court a discretion to extend time. There being a conflict between O. 45, R. 7 and R. 9 of the Privy Council rules, there can be no doubt that, under the clear provisions in section 112 (b) cited above, the latter must prevail. This has now been held by Full Benches of the Bombay, Madras and Allahabad High Courts in 51 *Bom. 480*, 1 *L.L.R. (1938) Mad. 1097* and 1 *L.L.R.*

1. ('37) 14 *A. I. R. 1937 Bom. 217*; 101 *I. C. 555*; 29 *Bom. L.R. 552*; 51 *Bom. 480* (F. B.), Nilkanth Balwant v. Sachidanand Vidya Narsinha Bharati.
2. ('38) 25 *A. I. R. 1938 Mad. 796*; 177 *I. C. 198*; 1 *L. L. R. (1938) Mad. 1007*; (1938) 2 *M. L. J. 138* (F. B.), Ramayya v. Lakshmayya.

(1939) All. 549.³ A Full Bench of the Rangoon High Court, also, has recently reached the same conclusion in A.I.R. 1940 Rang. 12.⁴ In the Lahore High Court the power of the Court to grant extension of time in such case was not questioned till 1935, and the Court extended time whenever sufficient cause was shown. In that year, however, a Division Bench took the contrary view in A. I. R. 1935 Lah. 733=159 I. C. 232.⁵ The learned Judges, disagreeing with the Full Bench ruling of the Bombay High Court in 51 Bom. 430,¹ preferred to follow the decisions of the Madras and Allahabad High Courts in 55 Mad. 835⁶ and 55 All. 432.⁷ Both these cases, however, have since been overruled by Full Benches of these Courts in I. L. R. (1938) Mad. 1007² and I.L.R. (1939) All. 549³ respectively, to which reference has already been made above. In our own Court also, Addison J., who had delivered the judgment in A. I. R. 1935 Lah. 733,⁵ appears to have subsequently changed his opinion. In A.I.R. 1938 Lah. 725,⁸ to which he was a party, the Bombay Full Bench decision in 51 Bom. 430¹ was cited with approval and it was held that the Court could, for cogent reasons, extend the time for making the deposit beyond six weeks from the grant of the certificate.

In our opinion A.I.R. 1935 Lah 733⁵ did not lay down the law correctly and, in agreement with the decisions of the Allahabad, Bombay, Madras and Rangoon High Courts and following A. I. R. 1938 Lah. 725,⁸ we hold, that extension of time can, in appropriate cases, be granted by this Court. The next question for consideration is whether in the cases before us the petitioners, or either of them, has shown sufficient cause for extension of time. The only ground urged is that owing to the general economic depression it has not been possible to raise the necessary funds and an extension of four months is asked for. The decree in this case was passed by this Court in July 1940 and more than eight months have already expired. The petitioners, therefore, had sufficient time to make arrangements. Moreover, mere poverty or inability to raise funds within the time fixed cannot be accepted as a cogent reason. However, having regard to the fact that the applications for extension were made before the expiry of the six weeks from the grant of the certificates and orders on these applications could not be passed before that date, we think that a short extension should be given to the petitioners to make the deposit. We accordingly extend the period up to 15th April 1941, in each case. The prayer in Civil Miscellaneous No. 118/C of 1940 that the petitioners be allowed to furnish security of immovable property cannot be granted. The parties shall bear their own costs of these proceedings.

R.K.

Period extended.

3. ('39) 26 A. I. R. 1939 All. 299 : 181 I. C. 378 : I.L.R. (1939) All. 549 : 1939 A. L. J. 278 (F. B.), Bishnath Singh v. Balvant Rao Naik.
4. ('40) 27 A.I.R. 1940 Rang. 12 : 185 I.C. 819 : 1939 B.L.R. 668 (F. B.), Ismail Piperdi v. Momin Bibi.
5. ('35) 22 A. I. R. 1935 Lah. 733 : 159 I. C. 232, Munna Lal v. Gajraj Singh.
6. ('32) 19 A. I. R. 1932 Mad. 484 : 138 I. C. 663 : 55 Mad. 835 : 62 M. L. J. 665, Poornananthachi v. T.S. Gopalaswami Odayar.
7. ('38) 20 A.I.R. 1938 All. 241 : 143 I. C. 559 : 55 All. 482 : 1938 A.L.J. 207 (F.B.), B., an Advocate of Benares v. Judges of High Court of Allahabad.
8. ('38) 25 A. I. R. 1938 Lah. 725 : 180 I. C. 398 : 1938 P. R. 712, Peoples Bank of Northern India Ltd. v. Ram Prasad Devi.

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TEK CHAND AND BECKETT JJ.

*Ram Parkash Chada and another —
Decree-holders — Appellants*

v.

*Jodh Singh — Judgment-debtor —
Respondent.*

Letters Patent Appeal No. 135 of 1940, Decided on 15th May 1942, from judgment of Sale J., in Exn. First Appeal No. 422 of 1939, D/- 2nd April 1940.

Limitation Act (1908), S. 7 and Art. 182—Suit in name of joint Hindu family firm by manager on his own behalf and as next friend of his minor brother — Decree obtained — Manager cannot by reason of O. 32, R. 6, Civil P. C., give valid discharge within S. 7 in respect of decretal debt without leave of Court — Execution proceedings taken by manager to realize decretal money independently on his behalf cannot be said to be representative so as to determine finally interests of minor by rule of constructive res judicata — Execution application by manager dismissed as time-barred — Fresh application by minor within three years of attaining majority is competent — Fact that decree was eventually passed in name of firm does not affect position : Exn. F. A. No. 422 of 1939, *REVERSED*.

Where in a suit by the manager of a joint Hindu family instituted in the name of the joint family firm through the manager on his own behalf and as next friend of his minor brother a decree is obtained, the manager cannot receive any money under the decree by reason of O. 32, R. 6, Civil P. C., and cannot give a valid discharge under S. 7 without leave of the Court in respect of the decretal amount whatever might be his powers as manager of the firm before the institution of the suit. The fact that the decree was eventually granted in the name of the firm without further mention of the minor does not affect the position. When proceedings have simply been brought in the name of a firm without any disclosure of the fact being made that there are minor members, there may be good reasons for regarding execution proceedings brought by a managing member in the name of the firm as being representative proceedings. But these are matters of general law when no particular rule of procedure comes in : ('27) 14 A. I. R. 1927 P.C. 56, *Ref.* [P 283g,h]

Since the leave of the Court is necessary for the manager to receive decretal money on behalf of the minor execution proceedings taken by the manager independently to realize the decretal money on his behalf, without making it clear that the money was to be realized on behalf of the minor as well as himself and asking the Court to permit such payment to be made, cannot be said to be representative proceedings of such character as to determine finally the interests of the minor member by the rule of constructive res judicata. This view derives support from the provisions of O. 21, R. 15, Civil P. C. Consequently, even when the execution application by the manager on his behalf was dismissed as time-barred an application for execution by the minor within three years of his attaining majority would be competent : 35 Mad. 235 (P.C.), *Id. on; Case law discussed; Exn. F. A. No. 422 of 1939, REVERSED.* [P 284a]

Limitation Act —

('42) Chitaley, S. 7. N. 15 Pt. 15.

('38) Rustomji, Page 144 Pt. 3; Page 145 Pt. 1; Page 147 Pt. 3.

C. P. C. —

('40) Chitaley, O. 32 R. 6, N. 1 Pts. 1 and 2.

('41) Mulla, Page 1026 Pts. (x) to (u); Page 1027 Pt. (v).

Shamair Chand — for Appellants.*M. C. Mahajan and R. L. Chawla* — for Respdt.

BECKETT J. — This Letters Patent appeal arises out of proceedings taken in execution of a final mortgage decree. At the time when the suit was instituted, Rama Shah and his minor brother Ram Parkash constituted a joint Hindu family trading under the style of Firm Bhagwan Das Nanak Chand; and the suit was brought in the name of the firm through Rama Shah on his own behalf and through Ram Parkash represented by his elder brother as his next friend, the two brothers being described as plaintiffs. The suit was not opposed and a preliminary decree was granted on 12th March 1929 for Rs. 14,000 with costs and future interest to be paid on or before 16th April next. When the proceedings came up again on that date, the amount due had not been paid and the Court proceeded to make the decree final although no application had been made on behalf of the decree-holders. There is nothing on the record to show that any intimation of this fact was given to Rama Shah, though the parties were present on 16th April, and he appears to have remained under the impression that he had still to apply for the decree to be made final, which he did on 23rd February 1932. The office was asked to report, and in so doing made no mention of the final decree; but when the matter came up again on 19th May 1932, the Court noticed that final decree had already been passed and rejected the application. Rama Shah then applied on the same day for execution of the final decree on behalf of the firm. Nothing was done, no service having been effected, and on 25th August the proceedings were consigned to the record room as infructuous at the request of Rama Shah, a note being made on the record to the effect that the application appeared on the face of it to be time-barred. There were two more applications after this and eventually the judgment-debtor appeared on 5th December 1935. He then took the objection that the proceedings in execution were barred by time. The plea was rejected by the executing Court and an appeal by the judgment-debtor to this Court was dismissed; but on further appeal under the Letters Patent the plea was accepted on 4th February 1937, and the application of Rama Shah was held to be barred by limitation. Permission was given to appeal to Privy Council but this had to be cancelled for lack of security. On 10th June 1937, Ram Parkash presented the present application for execution of the final decree. He had attained majority on 25th April 1935, less than three years before this application was presented, and he claimed that time was saved by S. 7, Limitation Act, 1908, which runs as follows:

"Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased."

According to the contention now put forward, Rama Shah could not have granted a valid discharge of the decretal debt by himself during the minority of Ram Parkash, who was not affected by the unsuccessful attempt of his brother to obtain satisfaction of the decree and was entitled to take out execution himself for the full amount on behalf of the family within three years of attaining majority. The executing Court held that, since the suit had been brought in the name of the firm, Rama Shah was competent to give a valid discharge as the managing partner, so that S. 7, Limitation Act, did not apply. It was further held that Rama Shah himself could have used the same plea when contesting the final appeal in the High Court, by which time Ram Parkash had attained majority, and that there was thus no reason why the previous decision should not be regarded as binding on the family, the previous application having been made on behalf of both the brothers. Ram Parkash appealed to this Court, but the same view was taken by the Judge who heard the case in single Bench, and Ram Parkash then instituted the present Letters Patent appeal. The arguments of Mr. Shamair Chand, who appeared on behalf of the appellant, may be briefly summed up. In the first place, he relies upon the provisions of O. 32, R. 6 (1), Civil P. C., which runs as follows:

"A next friend or guardian for the suit shall not without the leave of the Court, receive any money or other moveable property on behalf of a minor either—(a) by way of compromise before decree or order or (b) under a decree or order in favour of the minor."

Since Rama Shah had applied and been permitted to institute the mortgage suit as next friend of the minor, it is contended that he could not receive any money under the decree without leave of the Court whatever might be his powers as manager of the firm before the suit was instituted, and that he was not in a position to give a valid discharge within the meaning of S. 7, Limitation Act. It is further contended that this position is not affected by the fact that the decree was eventually granted in the name of the firm on whose behalf the application for execution was presented. As regards the effect of the earlier decision, the argument is much the same. Order 21, B. 15 permits a joint decree-holder to apply for execution for the benefit of all the decree-holders; but this would again require leave of the Court, which must make such orders as it deems necessary for protecting the interests of the other decree-holders; and in the absence of any express order, it is argued that the proceedings on such an application cannot be regarded as representative, even if this is a matter to which the principle of constructive res judicata would apply. The first of these arguments is based upon the Privy Council decision in 36 Mad. 295.¹ This was a case relating to partition. A suit had been brought by one member of a joint family against the rest, and the father of one of the defendants had been appointed his guardian ad litem by the Court. A decree was passed and the father eventually entered into a compromise on behalf of his minor son. On attaining majority, the son brought a suit in which the validity of this compromise was contested. It was held that the compromise was not binding upon him since the powers of the father were controlled by S. 462, Civil P. C., as then in force, which cor-

1. (19) 36 Mad. 295; 19 L.C. 515; 40 I.A. 182; 28 M.L.J. 150 (P.C.), *Ganesh Row v. Tulja Ram Row*.

responded with O. 32, R. 7, attached to the present Code. The relevant portion of the judgment is as follows :

"It seems to their Lordships that there is a fallacy underlying the reasoning on which the Courts below have proceeded. No doubt a father or managing member of a joint Hindu family may, under certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family. But where a minor is party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court. Section 462, Civil P.C., expressly provides that :

"No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian."

The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was also guardian ad litem for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and as it was a bona fide settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family. How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian ad litem, is a question which does not arise in the case and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment."

The principle underlying this decision was applied to execution proceedings in 47 Mad. 920,² with reference to the combined effect of O. 32, R. 6 and S. 7, Limitation Act. This was a case in which a Hindu father and his three minor sons, who were represented by him as their next friend had obtained a joint decree. The father died without taking out execution. The eldest son then applied for execution, within three years of attaining majority, but more than three years after the decree. It was held that, since the father had acted as next friend of his minor sons, he was not, during his life-time, in a position to give a legal and valid discharge of the decree without leave of the Court in view of what had been said by their Lordships of the Privy Council in 36 Mad. 295.¹ As a consequence of this since the father was not competent to give a valid discharge during his lifetime, it was further held that time for making an application for execution did not begin to run as against any of the joint decree-holders until their respective disabilities had ceased, and so the application was not barred by limitation.

The same view with regard to the power of the manager of a joint Hindu family to give a valid discharge for a decretal debt after having been appointed next friend or guardian was followed by the

same Court in A. I. R. 1925 Mad. 230,³ and it has subsequently been adopted with reference to the application of S. 7, Limitation Act, by Division Benches of the Patna and Calcutta High Courts in A. I. R. 1939 Pat. 33⁴ and A. I. R. 1939 Cal. 588.⁵ With reference to certification only, the principle laid down in 36 Mad 295¹ has been applied to execution proceedings by a Single Bench of this Court in A. I. R. 1937 Lah. 387.⁶

On behalf of the judgment-debtor, Mr. Mehr Chand Mahajan still seeks to contest the applicability of this principle to execution proceedings. His argument being that the manager of a joint Hindu family has unlimited power to grant a discharge for all debts due to the family, whether due under a decree or not. But he has not really been able to advance this argument beyond what was advanced by him in support of the same contention in A.I.R. 1937 Lah. 387,⁶ where it is pointed out that any cases which may seem to support this point of view were either decided before the Privy Council decision or before the implications of that decision had been realized. It is a matter of logical conclusion from the Privy Council decision that the manager of a joint Hindu family loses his independent power to give discharge for a debt due to the family when once the debt has merged in a decree resulting from proceedings in which he has acted as the next friend or has been appointed the guardian ad litem of a minor member of the family; and if the power of discharge mentioned in S. 7, Limitation Act, means an independent power of discharge, which is the view generally accepted, then the operation of S. 7 is necessarily invited. When once the manager has acted in either of these capacities, it becomes necessary to draw a clear distinction between a decretal debt and other debts.

The learned Judge in Single Bench has distinguished the Privy Council decision on the ground that it does not deal with a decree affecting a firm, but a decree in favour of four persons of whom one happened to be the karta of the family while another was a minor; and this takes us to the second of the arguments put forward by Mr. Shamair Chand, who contends that it makes no difference whether a decree is passed in favour of more persons than one suing in the name of a firm or of all those persons individually. In any case, since all the members of the family were specifically named when the suit was brought, and they were described as plaintiffs, of whom one was suing through his guardian and next friend, he claims that the decree should be regarded as having been granted in favour of those persons rather than as having been granted in favour of the firm.

It does not seem necessary to go into these questions at any great length, more particularly since the wider of the two propositions would take us into a field of discussion which is hardly necessary for the purposes of this case. Mr. Mehr Chand Mahajan has pointed out an apparent conflict between two rules contained in different orders. Rule 1 of O. 30

3. ('25) 12 A. I. R. 1925 Mad. 230 : 82 I. C. 588 : 47 M. L. J. 498, Pitchakkanttiya Pillai v. Doraiswamy Moopanar.

4. ('39) 26 A. I. R. 1939 Pat. 33 : 177 I. C. 713 : 19 P. L. T. 855, Parmeshwari Singh v. Ranjit Singh.

5. ('39) 26 A. I. R. 1939 Cal. 588 : 186 I. C. 72 : 70 C. L. J. 115 : 48 C. W. N. 962, Somorendra Nath v. Ashutosh Roy.

6. ('37) 24 A. I. R. 1937 Lah. 387 : 143 I. C. 379 : 38 P. L. R. 714, Kanchi Ram v. Gohra Shah Harichand.

2. ('25) 12 A. I. R. 1925 Mad. 78 : 82 I. C. 785 : 47 Mad. 920 : 47 M. L. J. 389, Latchmanan Chetty v. Subbiah Chetty.

a allows two or more persons claiming as partners to sue in the name of their firm, and this rule applies in the Punjab to a joint Hindu family trading partnership, of which one of the members may be a minor. On the other hand, R. 1 of O. 32 provides that every suit by a minor shall be instituted in his name by a next friend. It was suggested in A. I. R. 1923 Lah. 103⁷ that it might perhaps be necessary to draw a distinction between those cases in which a suit was brought under the firm name, no minor being mentioned, and those cases in which the minor is expressly named as partner. However this may be, we are here concerned only with a case in which a suit has actually been instituted in the name of a minor through his next friend, the name of the firm being given at the same time. In such a case, when a minor has been made an actual party, and another person has been accepted as his next friend, it seems b to us that the prohibition contained in R. 6 of O. 32 must necessarily apply and must take effect in the manner laid down by their Lordships of the Privy Council. Nor is the prohibition removed merely because a decree is eventually passed in the name of the firm without further mention of the minor. When a next friend has once acted as such and has not been replaced, he cannot afterwards receive any money which may be due to the minor under the decree without obtaining the leave of the Court.

At this point, it will be convenient to summarise conclusions which were reached at an earlier stage of this judgment. Since Rama Shah has appeared in the original suit as the next friend of his minor brother Ram Parkash, he could not lawfully receive any money which might be jointly due to them under the decree without the leave of the Court. In c view of the clear provisions of O. 32, R. 6 he was consequently not in a position to give a valid discharge for the decretal debt without first obtaining such leave. The question which then arises lies within a very narrow limit. If it cannot be held that Rama Shah could give an effective discharge without the leave of the Court and the decree would have to be treated as subsisting even though payment might actually have been made to Rama Shah, can it be consistently held that any steps taken independently by Rama Shah for the recovery of the amount due should have the effect of precluding Ram Parkash from taking steps of his own to recover the amount in due course, as he would have been able to do, if it had not been for the action taken by his brother? In other words, if Rama Shah could not grant a valid discharge on behalf of his brother, could he give an equally effective discharge by his failure to press home a reasonable plea on the question of limitation, when the attention of the Court had not been drawn to the fact that the matter affected the interests of a minor who had been placed under its special protection?

d On behalf of Ram Parkash, Mr. Shamair Chand relied on 57 Mad. 696,⁸ which has already been mentioned as laying down the general proposition that payment to one member of a joint family alone cannot be taken as a valid discharge of a decretal debt, when the decree has been passed in the name of the firm as represented by its managing partner. Mr. Shamair Chand further contends that execution proceedings brought by one of several joint decree-holders under O. 21, R. 15 cannot be re-

garded as representative proceedings so as to bind the other decree-holders, unless the executing Court has passed an express order under sub-r. (2) for the purpose of protecting interests of the persons who have not joined in the application. On the other side, an attempt has been made to show that the trend of decisions has not been in the same direction in the Punjab, where it has been usual to treat execution proceedings brought by the managing member of a firm as brought in the interests of the other decree-holders, even though this may not be expressly stated, and also to treat the managing member of the family as entitled to accept payment in that capacity, reference being made to 13 Lah. 546⁹ and A.I.R. 1927 Lah. 385.¹⁰

The propositions thus stated and traversed are much wider than it is necessary to consider for the purposes of the present case. On the general aspect it is sufficient to say, with all respect, that the view f taken in 57 Mad. 696,⁸ may possibly not be a necessary corollary from the wording of O. 21, R. 1 (from which the reasoning in the judgment is ultimately derived), and that it is still open to consideration whether the validity of a discharge given by one of several joint decree holders may not rather be dependent on whether the payment has actually been received on behalf of the other decree-holders with their express or implied assent, in which case the question would be merely one of fact. These, however, are matters which would arise for consideration only in execution proceedings taken out in the name of a firm consisting of the adult members only, or possibly in the name of a family including minor members, when they have not yet been specifically impleaded by name with a next friend in charge of their interests. g

We are now concerned only with the position, which arises when a next friend has in fact been appointed and has thereby become incapacitated from realizing any decretal money on behalf of the minor without the express leave of the Court. No case exactly in point has been cited before us, and it is simply a question of determining the effect of O. 32, R. 6, Civil P. C. When this rule definitely forbids a next friend to receive any money on behalf of the minor concerned without the leave of the Court, it would seem to be a necessary corollary that he cannot apply to the Court to realize the money on his behalf, without making it clear that the money is to be realised on behalf of the minor as well as himself and asking the Court to permit such payment to be made. Without such a corollary, R. 6 could easily be rendered entirely nugatory. As h already mentioned, this obstacle arises only when a next friend has been appointed. When proceedings have simply been brought in the name of a firm, without any disclosure of the fact being made that there are minor members, there may be good reasons for regarding execution proceedings brought by a managing member in the name of the firm as being representative proceedings, such as the reasons given by their Lordships of the Privy Council in 51 Bom. 450¹¹ with regard to suits generally; but these are matters of general law, when no particular rule of procedure comes in. When the leave of the Court is

7. (23) 10 A. I. R. 1923 Lah. 103 : 68 I. C. 750, Sukha Nand v. Behari Ram Ishar Das.

8. (34) 21 A.I.R. 1934 Mad. 830 : 148 I. C. 860 : 57 Mad. 696 : 66 M. L. J. 656, Muthuswamy Iyer v. Narasimha Ayyar.

9. (32) 12 A.I.R. 1933 Lah. 596 : 138 I. C. 479 : 13 Lah. 546 : 38 P. L. R. 290, Ganesh Das v. Hari Singh.

10. (27) 14 A.I.R. 1927 Lah. 385 : 101 I. C. 742 : 28 P.L.R. 807, Ghulam Muhammad v. Sohna Mal.

11. (27) 14 A.I.R. 1927 P.C. 56 : 101 I. C. 44 : 51 Bom. 450 : 54 I. A. 129 (P. C.), Lingagouda v. Basangouda.

a necessary to receive decretal money on behalf of a minor, it does not seem to us possible to regard execution proceedings of this kind as representative proceedings, of such a character as to determine finally the interests of a minor member by the rule of constructive res judicata.

This rule also seems to derive support from the provisions of O. 21, R. 15, which at least seem to indicate that the executing Court is expected, in the interests of joint decree-holders, to exercise a vigilance which can only be properly exercised if it has all the necessary facts before it; and it is obviously necessary that the Court should know that the person applying for execution is a person not entitled to recover any money on behalf of one of the other joint decree-holders without special leave of the Court. For these reasons, we are of opinion that b Ram Parkash is not bound by the decision against his brother in execution proceedings and that the present application is within time. The appeal is accordingly accepted and the proceedings will be remanded to the executing Court for further action in execution. Ram Parkash will receive his costs so far incurred on his application from the judgment-debtor.

G.N./R.K.

Appeal accepted.

* A. I. R. (29) 1942 Lahore 284

TEK CHAND AG. C. J. AND SALE J.

Zaharia Mal — Plaintiff — Appellant
v.*Parmeshri Das and another —**Defendants — Respondents.*

c Second Appeal No. 783 of 1940, Decided on 23rd June 1942; case referred to larger Bench by Din Mohammad J., D/- 19th March 1941.

* Transfer of Property Act (1882), S. 6 (a)—“Any other mere possibility of a like nature”—Right to share in offerings or income of fairs etc.—Whether and when alienable explained—Right of persons who do not perform any priestly function at shrine or render any personal service at mandir or mela to share in income of fair in connexion with mandir held property and alienable.

It cannot be laid down as a broad proposition of law that the right to a share in the offerings made at a place of worship, or in the income of fairs or other functions held in connexion therewith, is a mere ‘possibility’ and therefore not alienable on the principle of law embodied in S. 6 (a). Nor can it be said that such a transfer is, in every case, void as being opposed to public policy, as the making of offerings by persons resorting to temples and other places of worship is a matter of volition with them and no one can compel another to make offerings on particular occasion to him and him alone. The determination of the question depends on a variety of considerations, e.g., the nature of the institution; the occasion on, and the purpose for which the amount is paid; the capacity in which it is appropriated by, or divided among, the persons concerned. A distinction must be drawn between cases in which emoluments are attached to a priestly office, and the cases in which the offerings are made to a deity and the persons who receive the same have not to render services of a personal nature as a consideration for the receipt of the offerings. The emoluments of the former kind are not in the absence of a custom or usage to the contrary, ordi-

narily transferable, for the simple reason that they are inseparably connected with a priestly office and it is contrary to public policy to allow such offices to be transferred to a person not competent to perform the worship, either, by private sale or by sale in execution of a decree. As the right to receive the offerings cannot be separated from the duty of officiating at the worship the law disfavors the transfer of such emoluments. But when the right to receive the offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship, there is no justification for holding that such a right is not transferable.

[P 285h; P 286a,b]

Therefore where persons who share the income of a fair held in connexion with a mandir do not perform any priestly or other sacerdotal functions at the shrine of the mandir, the right to receive share of such income is property and is alienable: (‘28) 15 A. I. R. 1928 All. 721, *Applied*; (‘16) 3 A. I. R. 1916 Cal. 269, *Expl.*; (‘39) 26 A. I. R. 1939 Lah. 15, *Disting.*

[P 286c,h]

T. P. Act —

(‘42) Chitale, S. 6, N. 6 Pt. 11.

(‘36) Mulla, Page 56 Pt. (w).

(‘34) Mitra, Page 46 N. 47.

Bishan Narain — for Appellant.*Qabul Chand Mital* — for Respondents.

ORDER OF REFERENCE TO BENCH

Din Mohammad J. — The main question involved in this case is whether a right to receive a share in the income of Masani fair held in connexion with the Sitla Mandir situate in Gurgaon is alienable. Both the Courts below have found that it is not and the appellant has challenged that decision in this appeal. In support of his contention that the right is alienable, counsel for the appellant relies on 50 All. 394,¹ A. I. R. 1929 Oudh 257,² A. I. R. 1937 Oudh 15,³ 57 I. C. 315⁴ and 97 I. C. 189.⁵ In 50 All. 394,¹ a Division Bench composed of Ashworth and Iqbal Ahmad JJ. held that where the right to receive offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship, there is no justification for holding that such a right is not transferable. In A. I. R. 1929 Oudh 257,² Misra and Raza JJ. observed that under Hindu law *britmahabrahmani*, i. e., the right to receive offerings from *jajmans*, is immovable property and consequently heritable and partible. In A. I. R. 1937 Oudh 15,³ *Srivastava*, Ag. C. J. and Smith J. held that a right to receive offerings made to a temple is not a mere possibility of the nature referred to in S. 6, cl. (a), T. P. Act, and consequently a transfer of such a right is not rendered void under that section, but is valid. In 57 I. C. 315,⁴ *Tudball and Kanhaiya Lal JJ.* observed that the *brit-jajmani* right is transferable. In 97 I. C. 189,⁵ the right of a *cosharer* in a village

1. (‘28) 15 A. I. R. 1928 All. 721; 113 I. C. 242; 50 All. 394; 26 A.L.J. 185, *Balmukand v. Tula Ram*.

2. (‘29) 16 A. I. R. 1929 Oudh 257; 118 I. C. 87; 5 Luck 31; 6 O. W. N. 249, *Gaya Din v. Gur Din*.

3. (‘37) 24 A. I. R. 1937 Oudh 15; 164 I. C. 1111; 1936 O.W.N. 845; 12 Luck 358, *Bhagwan Deen v. Billeshr*.

4. (‘21) 8 A.I.R. 1921 All. 266; 57 I.C. 315; 43 All. 35; 18 A.L.J. 895, *Mt. Lokya v. Sull*.

5. (‘26) 13 A. I. R. 1926 Nag. 266; 97 I. C. 189; 22 N. L. R. 108, *Techni Narayan v. Dhanam Chand*.

to recover from the lambardar his share of profits collected by him was held to be transferable.

As against this counsel for the respondent relies on 26 Cal. 356,⁸ 26 Mad. 317 and 43 Cal. 28.⁹ In 26 Cal. 356⁸ Banerjee and Rampini JJ. held that a suit for *wasilat* in respect of a turn of worship was not maintainable. In 26 Mad. 317, the sale of an office attached to a temple involving services of a personal nature and entitling the holder of it to receive emoluments was declared to be against public policy and unrecognizable or unenforceable by the Courts. In 43 Cal. 28,⁹ Sharfuddin and Coxe JJ. held that a right to receive offerings from pilgrims, resorting to a temple or shrine, is inalienable. This judgment was re-affirmed on an application for review as reported in 37 I. C. 960.⁹

The only authority of this Court relied upon by the respondent is that reported in A.I.R. 1939 Lah. 15,¹⁰ in which it was said that there can be no mortgage of profits that would accrue from immovable property from year to year as such profits were not interest in immovable property. It was further held there that such profits could not be pledged as they were neither moveable property nor goods. It is obvious that this authority is not in point. The question arising in the case is important and there is no authoritative pronouncement of this Court settling at rest the conflict appearing in other Courts. I accordingly forward this case to the Hon'ble Chief Justice for such action as he deems fit.

JUDGMENT OF DIVISION BENCH

TEK CHAND Ag. C.J.—This appeal raises the question whether a right to receive a share in the income of a fair, called the "massani mela", held at Gurgaon is alienable. The fair is held in connexion with a shrine known as Sitla Mandir and is attended by a large number of persons who make offerings on the occasion. It is common ground that the income from these offerings is not taken by any person performing priestly or other religious functions, but is distributed among the *biswedars* of mauza Gurgaon, according to their shares in the *khewat* (*hasab rasad khewat*). An account of the origin of the temple and the mela and their previous history is given at p. 81 of the Gazetteer of Gurgaon District, published in 1910, to which reference was made by counsel for both parties. It is stated there that originally, the income was divided among the descendants of one Singha Jat who had built the shrine, but later the Begum Sumroo, when the Gurgaon Parganah came under her rule, appropriated the proceeds during one month in each year.

After the termination of her rule however the entire income was made a perquisite of the land owners of the mauza, among whom it was divided *pro rata* according to the share in the *khewat*. Narain Singh Jat, father of Zabar Singh defendant 2, was a *biswedar* in Mauza Gurgaon and as such entitled to a share in the income of the *massani mela*. By a deed executed on 17th January 1932, Narain Singh

mortgaged the share in the income of the mela to Parmeshari Das (defendant 1), who is a *bania* by caste, for Rs. 500 bearing interest at Rs. 1-3-0 per cent. per mensem. The mortgagee was to receive the mortgagor's share of the income and appropriate it towards the principal and interest. When the whole amount had been paid off the mortgage was to stand redeemed.

The plaintiff, Zaharia Mal, who also is a *bania*, had a money decree against Narain Singh. In execution of this decree, the "equity of redemption" of Narain Singh's share in the income of the mela was attached and in the auction sale was purchased by Zaharia Mal himself for Rs. 100. In May 1939 Zaharia Mal instituted the present suit against Parmeshari Das for redemption of the mortgage. To this suit Zabar Singh, son of Narain Singh (who had died in the meantime), was also impleaded as a defendant. It was alleged in the plaint that Narain Singh's share in the income of the mela had passed to the plaintiff by the auction sale aforesaid and therefore he was entitled to redeem the mortgage which had been effected by Narain Singh in favour of Parmeshari Das; that Parmeshari Das mortgagee had already realised much more than what was due on foot of the mortgage; and that it be declared that the mortgage had been redeemed. In the alternative, it was prayed that Parmeshari Das be required to render an account and a decree for redemption be passed on payment of the amount found due. Parmeshari Das pleaded, *inter alia*, that the auction sale of Narain Singh's share in the income of the mela in favour of the defendant was void, as such share was not "property" but was *res extra commercium*, and as such inalienable. In his replication, the plaintiff traversed this plea and also contended that Parmeshari Das, defendant, being himself a mortgagee from Narain Singh of his share in the income of the mela, was estopped from raising the objection that a *biswedar's* share in the income was not "property" and was inalienable.

On these pleadings the trial Judge framed the following three preliminary issues: (1) Is not the right to receive profits from *Massani fair* held in Gurgaon a right to property? (2) If issue 1 is proved, does the suit lie? (3) Cannot defendant 1 raise the objection as given in issue 1? He found all the issues in favour of the defendant and dismissed the suit, without going into the merits. The plaintiff's appeal having been dismissed by the District Judge, he has preferred this second appeal in this Court. The appeal came up for hearing before Din Mohammad J. in Single Bench, who had referred it to a Division Bench.

We have heard counsel at length and have no doubt that the decision of the Courts below is erroneous and that this appeal must succeed. It cannot be laid down as a broad proposition of law that the right to a share in the offerings made at a place of worship or in the income of fairs or other functions held in connexion therewith is a mere "possibility" and therefore not alienable on the principle of law embodied in S. 6 (a), T. P. Act. Nor can it be said that such a transfer is, in every case, void as being opposed to public policy, as the making of offerings by persons resorting to temples and other places of worship is a matter of volition with them and no one can compel another to make offerings on particular occasion to him and him alone. The determination of the question depends on a variety of considerations, e.g., the nature of the institution, the occasion on, and the purposes for which the amount is paid; the capacity in which it is appropriated by,

6. ('99) 26 Cal. 356: 3 C.W.N. 279, Kashi Chandra v. Kailash Chandra.
7. ('05) 26 Mad. 31, Lakshmanaswami Naidu v. Rangamma.
8. ('16) 3 A. L. R. 1916 Cal. 269: 28 I. C. 875: 43 Cal. 28: 19 C. W. N. 580, Pundha Thakur v. Bindeswari Thakur.
9. ('16) 3 A.I.R. 1916 Pat. 62: 37 I.O. 360, Pundha Thakur v. Bindeswari Thakur.
10. ('39) 26 A.I.R. 1939 Lah. 15: 179 I.C. 968: 41 P.L.R. 239; Punjab National Bank, Ltd., Amritsar v. Punjab Co-operative Bank, Ltd., Amritsar.

or divided among, the persons concerned. If these factors are kept in view, many of the rulings, which appear to be in conflict, will be reconcilable. The correct legal position relating to this matter is if I may say so with respect, very clearly stated in 50 All. 394¹ at p. 399. In that case the learned Judges Ashworth and Iqbal Ahmad JJ., observed that "a distinction must be drawn between cases in which emoluments are attached to a priestly office, and the cases in which the offerings are made to a deity and the persons who receive the same have not to render services of a personal nature as a consideration for the receipt of the offerings. The emoluments of the former kind are not, in the absence of a custom or usage to the contrary, ordinarily transferable, for the simple reason that they are inseparably connected with a priestly office and it is contrary to public policy to allow such offices to be transferred to a person not competent to perform the worship, either by private sale or by sale in execution of a decree. As the right to receive the offerings cannot be separated from the duty of officiating at the worship the law disfavours the transfer of such emoluments. But when the right to receive the offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship, we are unable to discover any justification for holding that such a right is not transferable. That the right to receive the offerings, when made, is a valuable right and is property, admits of no doubt and therefore that right must, in view of the provisions of S. 6, T. P. Act, be held to be transferable, unless its transfer is prohibited by the Transfer of Property Act or any other law for the time being in force."

The present case clearly falls within the latter class of cases described in the Allahabad judgment just cited. As has been stated above, it is common ground that persons who share the income of the Masani mela do not perform any priestly or other sacerdotal functions at the shrine of the goddess Sitla. Nor do they render any services of a personal nature at the Mandir or the mela. On the other hand, they share the income merely because they are biswedars owning land in the village, and the amount payable to each bisweddar is proportionate to his share in the khewat. That this right is property and has a marketable value is further clear from the admitted fact that in order to facilitate the collection of the income and its proper distribution among the various biswedars, an arrangement has with the approval of Government been in force for several decades, under which the income from the mela is auctioned at the beginning of each year to a contractor. The contractor pays the amount at which his bid is accepted and is authorised to collect the income at the mela or melas held during the year. If the actual income received is in excess of the contract money, he keeps it himself; if there is a deficit he makes it good from his own pocket. Out of the contract money, Government revenue is paid first and the balance is distributed *hasab rasad* khewat among the biswedars. The contractor has no priestly functions to perform, or personal services to render. He may belong to any caste and may not be connected in any way with the founder of the shrine. He takes the contract purely as a business, like the contractor of "gate money" at the races, or wrestling or cricket matches.

The shares of the biswedars in the income of the Masani Mela at Gurgaon have been the subject of voluntary alienation and attachment and sale in execution of decrees for a very long time. The ear-

liest reported case is 74 P. R. 1886¹¹ in which the arrangement above-mentioned for the auction sale of the income from the offerings of the Mela, the payment of revenue and the distribution of the balance among the cosharers in the village in sums proportionate to their khewat holdings, is described in great detail. In that case it was taken for granted that the right to share in the income was alienable; the only question in dispute was whether the suit by a bisweddar for recovery of his share of the contract money was cognizable by a civil Court or a revenue Court in view of the provisions of S. 45 of Act 18 of 1884.

In A. I. R. 1936 Lah. 100,¹² the suit had been instituted by a person to whom a bisweddar had mortgaged his share in the offerings against the contractor and his surety for recovery of the share of the mortgagor and it had been held in the Courts below that such a suit was competent. The appeal to the High Court failed on the ground that the amount involved was below Rs. 500 and the suit being in the nature of a small cause suit no second appeal lay. More recently in Regular Second Appeal No. 927 of 1940 one of the questions raised was whether the share in the income of the mela was alienable and a suit for recovery of it could be brought by the alienee against the contractor. This question was answered in the affirmative. It is also noteworthy that in this case the plaintiff, as well as the contesting defendant, Parmeshri Das are banias and both claim to derive title by alienations in their favour by a jat bisweddar, who was one of the original cosharers in the income of the mela.

The lower Courts have relied largely on 43 Cal. 28,³ where it was held that the right to receive offerings from pilgrims, resorting to a temple or shrine, is inalienable, such a right being *res extra commercium*. It was also observed that the chance that future worshippers will give offerings is a mere possibility and as such it cannot be transferred. The dispute in that case arose out of the transfer by one of the priests of the temple of Shri Bhairon Nath, of his right to share in the offerings, to a third party. That right was inseparable from the performance of priestly duties. The case fell within the first category of cases described in 50 All. 394¹ and it was held, if I may say so, rightly that the right was not alienable.

The learned District Judge also referred to a Division Bench decision of this Court reported in 1939 P. L. R. 239,¹⁰ but the dispute in that case related to mortgage of yearly profits of certain immovable property. As pointed out by Din Mohammad J. (who was a party to that decision) that case is not in point. It is not necessary to discuss the other rulings cited by counsel, as each was decided on its own peculiar facts. We hold that the share of Narain Singh in the income of Masani Mela at Gurgaon is 'property' and is alienable and the present suit is maintainable. We accordingly accept the appeal, set aside the judgment and decree of the Courts below and remand the case to the Court of first instance for framing issues on the merits and disposal in accordance with law. Court fee on this appeal shall be refunded; other costs will be costs in the cause. Both counsel have been directed to cause their clients to appear before the trial Court on 20th July 1942 when a date for further proceedings will be fixed.

K.S./R.K.

Appeal allowed.

11. ('86) 74 P.R. 1886, Ude Ram v. Sanda.

12. ('36) 23 A. I. R. 1936 Lah. 100 : 132 I. C. 692, Raghunath Singh v. Dhumi Mal.

A. I. R. (29) 1942 Lahore 287

YOUNG C. J. AND MUHAMMAD MUNIR J.

*Chaudhri Abdul Ghani — Plaintiff—
Appellant*

v.

*Anjuman Dehi Imdad Bahmi Ghuinke
Sharqi (in liquidation) through S.
Tufael Hussain, Liquidator —*

Defendant—Respondent.

Letters Patent Appeal No. 192 of 1940, Decided on 30th January 1942, from decree of Beckett J., in S. A. No. 1770 of 1939, D/- 14th June 1940.

Co-operative Societies Act (1912), Ss. 42 and 43 — Liquidator appointed by Registrar under S. 42 whose appointment is regulated by rules framed by Punjab Government under S. 43 is public servant within S. 2 (17) (h), Civil P. C. — Section 2 (17) (d), Civil P. C., does not apply to him.

A Liquidator who has been appointed by the Registrar under S. 42 and the terms of whose appointment are regulated by the rules framed by the Punjab Government under S. 43 is a public officer within the meaning of S. 2 (17) (h), Civil P. C., and hence in a suit against him notice under S. 80, Civil P. C., is necessary: ('34) 21 A. I. R. 1934 Nag. 201 and ('89) 26 A. I. R. 1939 Nag. 232, *Rel. on*; 12 Bom. H.C.R. 1 and ('18) 5 A.I.R. 1918 Lah. 152, *Disting.*; ('40) 27 A.I.R. 1940 Mad. 831, *Not approved.* [P 288a,b]

The appointing authority being not a Court of justice but the Registrar of Co-operative Societies, the Liquidator is not an officer of a Court of justice and therefore S. 2(17) (d), Civil P. C., is not applicable to him: ('34) 21 A. I. R. 1934 Oudh 158 and ('20) 7 A.I.R. 1920 Bom. 50, *Disting.* [P 288g]

C. P. C. —

('40) Chitaley, S. 2 (17) Pt. 9b.

('41) Mulla, Page 16 N. "Public officer."; Page 310 Pt. (v).

Mahmud Ali—for Appellant.

Achhru Ram—for Respondent.

MUHAMMAD MUNIR J. — This is an appeal under Cl. 10, Letters Patent, from the judgment of Beckett J. by which he dismissed the appellant-plaintiff's suit which had been decreed both by the trial Court and the lower appellate Court. The suit out of which the appeal has arisen was instituted in the following circumstances: The registration of the Co-operative Credit Society of Ghuinke Sharqi was cancelled by the Registrar and one Sant Singh, who is not a Government servant, was appointed a liquidator under S. 42, Co-operative Societies Act, 1912 (Act 2 of 1912). The liquidator ordered the appellant Abdul Ghani to contribute to the assets of the society a sum of Rs. 5000. Thereupon the appellant filed a suit against the liquidator for a declaration that his order was illegal and ultra vires because the appellant had ceased to be a member of the society more than two years before the order in question was made and that consequently the liquidator by reason of S. 23 of the Act had no jurisdiction to make him liable for any contribution. In the suit the appellant also asked for a perpetual injunction restraining the liquidator from taking any steps to enforce the order for contribution. One of the pleas taken by the liquidator in defence was that he was a public officer and that under S. 80, Civil P. C., the suit could not be insti-

tuted against him without a written notice. The trial Court held that the defendant was not a public officer and decreed the suit on the merits. On appeal the Senior Subordinate Judge agreed with the conclusions of the trial Court and confirmed the decree.

On second appeal by the liquidator, Beckett J. in his order dated 14th June 1940 held that the liquidator was a public officer within the meaning S. 2 (17) (h), Civil P. C., and that the suit against him could not be instituted without serving on him a notice in writing as required by S. 80 of the Code. He, therefore, set aside the decrees of the Court below and dismissed the suit. The plaintiff has filed the present appeal under Cl. 10, Letters Patent, as the sole question we have to decide is whether liquidator who has been appointed by the Registrar under S. 42, Co-operative Societies Act and the terms of whose appointment are regulated by the rules framed by the Punjab Government under S. 43 that Act is a public officer within the meaning cl. (h) of sub-s. (17) of S. 2, Civil P. C., which defines a public officer inter alia as follows:

"Every officer in the service or pay of the Crown or remunerated by fees or commission for the performance of any public duty."

The learned Judge has held that the liquidator in the present case cannot be said to be in the service or pay of the Crown and that, therefore, the first part of the definition is not applicable to him. He has, however, held that the duties which the liquidator performs under S. 42 (2), Co-operative Societies Act, are public duties and, therefore, the latter part of the definition being applicable, the liquidator is a public officer within the meaning of that definition. Appellant's counsel Mr. Mahmud Ali contends before us that the liquidator is not a public officer because (1) he is not an officer; (2) there is nothing to show that he is remunerated by fees or commission; and (3) that he does not perform any public duty. In support of his first contention he refers to an old decision of the Bombay High Court reported in 12 Bom. H.C.R. 1, in which West J. held that an izaphatdar is not an "officer" within the meaning of cl. (9) of S. 21, Penal Code. The concluding words of which are the same as those of cl. (h) of sub-s. (17) of S. 2, Civil P. C., and to the decision of the Punjab Chief Court in 18 P. Cr. 1918² where Rattigan C. J. and LeRossignol held that a Quarter-Master Clerk is not an "officer" under the Penal Code. These decisions are entirely distinguishable from the present case inasmuch as in the Bombay case the person whose status was in question was a mere lessee of a Government for whom he had by a contract with the Government agreed to work a forest, and in the Punjab case the person whose position had to be determined was a clerk, no more an officer than a labourer or man employed and paid by Government. In our opinion there can be no doubt that a functionary who is appointed by a public officer under the authority of a Statute to perform work of a public nature is an "officer" in the usual acceptation of the word. Bacon's Abridgment, Vol. 6, page 2, it is stated "that the word 'officium' principally implies a duty and in the next place, the charge of such duty; that it is a rule that where one man hath to do with another's affairs against his will, and with

1. ('75) 12 Bom. H. C. R. 1, *Reg. v. Ramaj Jivabajirav*

2. ('18) 5 A.I.R. 1918 Lah. 152; 45 I. C. 150; Cr. L. J. 486; 18 P. R. 1918 Cr.; 96 P. L. 1918, *Ahad Shah v. Emperor*.

his leave, that this is an office, and he who is in it is an officer."

In view of the powers conferred on a liquidator by sub-s. (2) of S. 42, Co-operative Societies Act, 1912, this definition appears to us to be fully applicable to him. In 44 Bom. 895,³ a person who was not an Official Receiver under S. 19, Provincial Insolvency Act, but was specially appointed a receiver in a particular insolvency was held to be an "officer" of a Court of justice and therefore a public officer within the meaning of cl. (d) of sub-s. (17) of S. 2, Civil P. C. We think, therefore, that a liquidator appointed by the Registrar under S. 42, Co-operative Societies Act, to wind up a society is clearly an "officer." It is true that there is no evidence to show that the liquidator in the present case is remunerated by any fees or commission. But the rules framed by the Punjab Government under S. 43, Co-operative Societies Act, provide that the Registrar while appointing a liquidator shall fix the amount of the fee payable to him; and that being so, we must presume that in this case the Registrar must have acted according to the rules and fixed the fee payable to him. Consequently, we hold that the second condition of the definition is also satisfied in this case. The duties of a liquidator appointed under S. 42, Co-operative Societies Act, are defined by that section as follows :

"(a) to institute and defend suits and other legal proceedings on behalf of the society by his name of office; (b) to determine the contribution to be made by the members and past members of the society respectively to the assets of the society; (c) to investigate all claims against the society and, subject to the provisions of this Act, to decide questions of priority arising between claimants; (d) to determine by what persons and in what proportions the costs of the liquidation are to be borne; and (e) to give such directions in regard to the collection and distribution of the assets of the society, as may appear to him to be necessary for winding up the affairs of the society."

Subject to any rules, a liquidator appointed under this section has, in so far as such powers are necessary for carrying out the aforesaid purposes power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and (so far as may be) in the same manner as is provided in the case of a civil Court under the Code of Civil Procedure. It is clear from these provisions that the liquidator has power to decide not only disputes between the members and the society but also the claims of third parties against the society and that for this purpose he has the power to enforce the attendance of witnesses and to compel the production of documents in the same way as a civil Court. He is, therefore, a special forum created by the Legislature for the purpose of determining disputes concerning the affairs of the society of which he is the liquidator. It is impossible to suggest that when exercising these powers he is performing a private duty. The object of the Co-operative Societies Act being the promotion of thrift and self-help among a section of the public, i. e., agriculturists, artisans and persons of limited means, it appears to us that persons who are appointed by Government or by public authority for the purpose of performing any statutory functions under that Act must be deemed to be public servants.

3. (20) 1 A. I. R. 1920 Bom. 50; 58 I. C. 411 : 44 Bom. 895 : 22 Bom. L. R. 987, *Annalucia De Silva v. Govind Balwant*.

Mr. Mahmud Ali has drawn our attention to some observations in a recent Madras case reported in A. I. R. 1940 Mad. 881,⁴ in which the learned Judges found it difficult 'to accept the general proposition that because the liquidator is given quasi judicial powers, the duties which he performs must necessarily be regarded as being public duties.' This remark was obiter, the case having been decided on other grounds, and cannot, therefore, be treated as a considered pronouncement on the question.

In A. I. R. 1934 Nag. 201,⁵ a liquidator appointed under S. 42, Co-operative Societies Act, was treated as a public officer; and in A. I. R. 1939 Nag. 232,⁶ it was definitely held by Pollock J., that because such liquidator performs duties of a quasi judicial nature and has authority to summon and enforce the attendance of witnesses and to compel the production of documents in the same way as a civil Court, he is a 'public officer' as defined in the Code of Civil Procedure. In the latter case the person appointed liquidator by the Registrar under S. 42, Co-operative Societies Act, was the manager of a Central Co-operative Bank and was not paid any remuneration for the work of winding up the society apart from his salary as manager of the Co-operative Central Bank Ltd. He was nevertheless held to be a public officer because he was appointed by the Registrar and performed public duties.

Mr. Achhru Ram, who appears for the respondent, has drawn our attention to 9 Luck. 577,⁷ in which an Official Liquidator appointed under the Companies Act (7 of 1913) was held to be a public officer, and to 44 Bom. 895,³ in which a receiver appointed under the Provincial Insolvency Act was held to be such officer. These decisions are however distinguishable because the receiver was held there to be a public officer within the meaning of cl. (d) of sub-s. (17) of S. 2, Civil P. C., on the ground that he was an officer of a Court of Justice whose duty as such officer was to take charge or dispose of property. In the present case the appointing authority being not a Court of Justice but the Registrar of Co-operative Societies, the liquidator is not an officer of a Court of Justice and, therefore, cl. (d) of sub-s. (17) of S. 2, Civil P. C., is not applicable to him. For the reasons given we hold that the liquidator in this case was a public officer and that the suit against him could not be instituted without the service of a written notice as required by S. 80, Civil P. C. The appeal is therefore dismissed with costs.

G.N./R.K.

Appeal dismissed.

4. ('40) 27 A. I. R. 1940 Mad. 881 : 194 I. C. 769 : I. L. R. (1940) Mad. 929, *Kuppu Govinda Chettiar v. Uttukottai Co-operative Society*.
5. ('34) 21 A.I.R. 1934 Nag. 201 : 148 I.C. 714 : 30 N. L. R. 240, *Yedha Society, Nimar v. Prag Das*.
6. ('39) 26 A. I. R. 1939 Nag. 232 : 182 I. C. 514, *Society Sangakheda Kalan Co-operative Bank, Hoshangabad v. Ayodhyaprasad Shiamlal*.
7. ('34) 21 A.I.R. 1934 Oudh 158 : 143 I. C. 448 : 9 Luck. 577 : 11 O. W. N. 398, *Kathiawar and Ahmedabad Banking Corporation Ltd. v. Ramcharan Lal*.

* A. I. R. (29) 1942 Lahore 289

FULL BENCH

TEK CHAND, RAM LALL AND
BECKETT JJ.Nazir Ahmad and others — Plaintiffs
— Appellants

v.

Peoples Bank of Northern India Ltd.,
(in liquidation) through Official
Liquidator, and others, Defendants
and another, Plaintiff—Respondents.Letters Patent Appeal No. 166 of 1940, Decided on
20th March 1942, case referred to Full Bench by Tek
Chand and Beckett JJ., D/- 14th November 1941.

(a) Companies Act (1913), S. 171 — S. 171 being borrowed from English statute should be construed in same way as under English statute—Suit instituted without leave under S. 171 — Leave subsequently applied for before but granted after limitation for suit — Suit should not be dismissed — Limitation should be calculated in same way as if suit was originally instituted with leave: 38 P.L.R. 1104=(‘36) 23 A.I.R. 1936 Lah. 401=164 I. C. 136, *OVERRULED*; (Per Full Bench).

Since the words used in S. 171 were borrowed from the English law where they had a recognized legal meaning attached to them it should be assumed that the same meaning was assigned to those words by the Companies Act which borrowed the language of English statute: 3 M. H. C. R. 384, *Rel. on.* [P 290g]

A suit instituted against a company in liquidation without leave under S. 171 should not be dismissed on that ground alone. Where a plaintiff institutes a suit against a company in liquidation without the leave of the Court under S. 171 and subsequently applies for such leave within the period of limitation of the suit and the leave is granted only after the period of limitation has expired, the suit should not be dismissed and limitation should be calculated in the same way as if the suit had originally been instituted with leave: 38 P. L. R. 1104=(‘36) 23 A.I.R. 1936 Lah. 401=164 I. C. 136, *OVERRULED*; *English and Indian case-law discussed.* [P 291d, e]

Limitation Act —

(‘42) Chitaley, S. 3, N. 13.

(‘88) Rustomji, Page 57 Pt. 4.

(b) Companies Act (1913), S. 171 — Suit and action are interchangeable terms (Per Ram Lall J.).

A “suit” and an “action” are interchangeable terms so far as procedure in India is concerned.

[P 292g, h]

(c) Provincial Insolvency Act (1920), S. 28 (2) — Proceedings taken without leave under S. 28 (2) or S. 17, Presidency Towns Insolvency Act—Leave subsequently granted—Proceedings are not nullity — Whether leave was granted before or after limitation for suit makes no difference (Per Ram Lall J.).

Proceedings taken without leave under S. 28 (2), Provincial Insolvency Act, or under S. 17, Presidency Towns Insolvency Act, are not necessarily a nullity. It is a matter for the Court to whom an application for leave has been made to decide on all

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the circumstances placed before it whether or not it should grant leave. If leave has been granted by that Court in regard to a suit commenced without leave, the proceedings are not a nullity and whether leave was granted before the period of limitation had run out on the filing of the suit or afterwards, makes no difference at all: *Case law discussed.*

[P 295b]

(d) Partnership Act (1932), S. 69—Subsequent registration before decree validates proceedings by unregistered firm (Per Ram Lall J.).

The right to enforce a claim is granted by a decree and if the condition for the enforcement of that remedy is complied with before the grant of a decree, it makes no difference whether this condition is complied with before or after the institution of a suit so long as it is complied with before the decree is made. The subsequent registration before the passing of a decree validates proceedings by an unregistered firm: (‘38) 25 A.I.R. 1938 Lah. 767 and (‘38) 25 A.I.R. 1938 Mad. 688, *Not approved*; (‘37) 24 A. I. R. 1937 Mad. 767 and 41 C. W. N. 534, *Approved*; (‘35) 22 A.I.R. 1935 Lah. 893, *Expl.*

[P 295e]

R. L. Chawla — for Appellants.

Mohsin Shah and Bhagwat Dayal —

for Respondents.

BECKETT J. — The facts giving rise to this reference have already been set out in the order by which the reference was made and need only be briefly stated. Certain property in which the plaintiffs claim to have an interest of their own was attached by the Official Liquidator of a company in liquidation. They applied for leave to object to the attachment and further to bring a declaratory suit, if necessary. Leave was given to raise objections in the executing Court, but nothing was said about leave to bring a declaratory suit. The objections having been dismissed, the plaintiffs then brought the present suit, thinking that the leave already granted was sufficient, but it was held that specific leave for a suit was required. The plaintiffs applied again for leave for this purpose, the application being made before the period of limitation for a declaratory suit of this kind had expired. Leave was eventually granted but not until after the period of limitation prescribed for the suit had run out. The question is whether the failure of the plaintiffs to obtain specific leave either before the suit was instituted or before limitation had expired is a sufficient ground for dismissing the suit as already instituted. The necessity for obtaining leave is prescribed by S. 171, Companies Act, 1913, which runs as follows:

“When a winding up order has been made or a provisional liquidator has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.”

This section was admittedly borrowed from the English statute law on the same subject. The only difference is that the word “suit” has been substituted for the word “action.” The case law relating to the question under reference is best stated by Mr. Solomon Judah at pp. 280 and 281 of his Commentary on the Act:

“If a suit is continued without leave obtained under the section the decree is not binding on the liquidator. Where a suit was instituted against a company in liquidation without leave of the Court it was held that leave subsequently obtained was not to be treated as a nullity and the suit should

^a not be dismissed, specially as the liquidator had not contested the order granting leave. Whenever proceedings are commenced without leave, the proper course for the liquidator is to apply to the Court for stay of the proceedings, and not to plead the omission to obtain leave as a bar to the further maintenance of the proceedings, as in practice, the section has always been worked out by applying to stay the proceedings."

The last portion of this comment is based upon four English cases : (1893) 2 Q. B. 146¹ at p. 148; (1866) L. R. 1 C. P. 694;² (1891) 1 Ch. 305³ and (1892) 1 Q. B. 77.⁴ Although the matter has only been made the subject of cursory observation, these cases certainly seem to support the statement made with regard to English practice. Decisions under the Indian Companies Act are few and none of them are directly applicable to the present case. The only previous decision of this Court is A. I. R. 1936 Lah. 401,⁵ in which it was held to be unnecessary to dismiss a suit instituted within time if leave was subsequently obtained before the period of limitation had run out, but that it would have to be dismissed as time-barred if leave is not obtained until after limitation had run out. I think that we are all agreed that it would be difficult to combine both these propositions. If the presentation of the plaint in the first instance is not to be treated as a complete nullity, then the effect of S. 3, Limitation Act, is to make the period of limitation date back to the time when the plaint was actually presented. On the other hand, if presentation is a mere nullity, the defect cannot subsequently be cured when leave is granted. The view that a suit should not be dismissed merely on the ground that leave was not obtained prior to its institution is supported by 52 All. 430⁶ though this again was a case in which leave was obtained before limitation had run out. There are two Calcutta cases in which the failure to obtain leave was treated as a sufficient ground for dismissal of the suits, but it does not appear that in either of these cases there was any question of granting leave, so that it would be immaterial whether the suit was dismissed or stayed indefinitely. With regard to cases of this kind in general, there are some relevant observations in (1890) 45 Ch. D. 1397 a case relating to proceedings under the Charitable Trusts Act, (although the proceedings were under a different Act, the relevant provisions were not greatly different) :

"Now, first of all, I come to that conclusion upon the language of the section. We are all of us familiar with the way in which Acts of Parliament are drafted to prevent actions being brought at all or writs being issued unless some condition precedent has been fulfilled. The language of such sections, we

are all familiar with, and the draftsman or the Legislature requires no 'obscure language' if they desire to enact such laws. But this section is not framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before the action is maintainable at all. On the contrary, both from the way in which it is framed, from the omission of the usual words, and also from the presence of words which seem to me to indicate that the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action, and not a bar to the original institution of the suit—on all these three grounds I come to the conclusion that this section enables the Court, in such cases as I have indicated, to allow the action to stand over in order that the blot which has occurred may be cured if possible."

Section 17, Charitable Trusts Act, 1853, provided that before any suit or other proceedings relating to certain charitable matters should be commenced, notice should be given and an order or certificate obtained, and that no suit or proceeding should be entertained or proceeded with except in conformity with the order or certificate. It is difficult to distinguish on any substantial point the language here used from that now under consideration. It has been suggested that a distinction has to be drawn between 'entertaining a suit' and 'commencing a suit,' but there does not appear to be any apparent distinction, and the earlier part of the section itself refers to the commencement of a suit. There are a large number of Indian decisions on somewhat similar provisions contained elsewhere, and more particularly in cases under the Provincial Insolvency Act, of which mention has been made in the order of reference; but, so far as any broad principle can be extracted from them, it is only to the effect that the application of any such provisions must depend upon the wording of the particular statute in which they are contained. The question is thus merely one of interpretation; that is, whether S. 171, Companies Act, was intended to entail as a necessary consequence the dismissal of a suit instituted without leave, or whether it was intended that a suit should be stayed until leave was obtained. As already indicated, the words used were borrowed from English law, where they had a recognised legal meaning attached to them, and I can see no reason why they should have been intended to convey an entirely new meaning as soon as they were incorporated in an Indian statute. In this connexion I should like to repeat the words used by Brittleston J. in 3 M. H. C. R. 384⁸ at p. 390, although they were used with reference to a different phrase :

"Now when words of such familiar use in the English law are adopted in an English legal instrument such as the Letters Patent constituting this Court — or in a legislative enactment of the Governor-General's Council in India—it is, I think, reasonable to suppose that they have been used in the sense which has been assigned to them by the decision of the English Courts; and as it seems to me we ought to be guided in our interpretation of them by those decisions."

There are many cases in which the technical meaning attached to legal terms in England should not be introduced into the construction of the wording of Indian statutes, but there is no question here of introducing any unnecessary complication from English law. On the contrary, it is a question of avoiding an unnecessary hardship which will ensue in attaching an entirely new meaning to words

1. (1893) 2 Q. B. 146 : 63 L. J. M. C. 29 : 5 R. 554 : 57 J. P. 693, Reg v. Lord Mayor of London; Ex parte Boaler.

2. (1866) L. R. 1 C. P. 694 : 14 W. R. 780, Gray v. Raper.

3. (1891) 1 Ch. 305 : 60 L. J. Ch. 492 : 39 W. R. 343, In re Wanzer Limited.

4. (1892) 1 Q. B. 77 : 61 L. J. Q. B. 32 : 66 L. T. 225 : 40 W. R. 208, Westbury v. Twigg and Co.

5. ('36) 23 A. I. R. 1936 Lah. 401 : 164 I. C. 136 : 38 P. L. R. 1104, Peoples Bank of Northern India Ltd. v. Fateh Chand and Co.

6. ('30) 17 A. I. R. 1930 All. 508 : 124 L. C. 28 : 52 All. 430 : 1930 A. L. J. 373, Peoples Industrial Bank v. Ram Chandra.

7. (1890) 45 Ch. D. 139 : 59 L. J. Ch. 641 : 68 R. 265 : 38 W. R. 689, Randall v. Blair.

8. ('67) 3 M. H. C. R. 384, DeSouza v. Golea.

a which had not hitherto had placed upon them an interpretation involving any such consequence. The hardship is obvious: the treatment of leave as a nullity, if it is granted out of the period of limitation, even though leave may be requisitioned in good time, would make the right claimed entirely dependent on the time which the Court took in disposing of the application, and the delay might be entirely the result of accident. In adopting the formula contained in S. 171, it seems impossible to suppose that the Indian Legislature could have intended to import a new meaning directly opposed to what has been held both in India and in England to be the real intention of a provision of this kind, namely, to secure an equal distribution of the assets of a company, but not to defeat any just claims.

b The only serious difficulty in the way of holding that S. 171 was intended to have the same effect as the corresponding section in England arises from the fact that in a number of cases a different interpretation has been placed upon the similar provision contained in the Provincial Insolvency Act. There is some slight difference in the wording but there is no great difference, and it would be difficult to base any distinction on the language used. Even so, I do not think that these decisions can affect the interpretation which should be placed upon S. 171. In the first place, even with regard to the provisions of the Provincial Insolvency Act, there is a sharp divergence of opinion, as is shown by 57 Bom. 623.⁹ In the second place, the decisions which have been cited before us were given after the original Companies Act was passed. If they had been given beforehand, they might have been used to show that such a formula already had a different meaning attached to it in India; but it is difficult to see how decisions based on the language of a different statute can be used to indicate the intention with which S. 171 was incorporated in a different statute, when these were not given at an earlier date. There do not appear to be any decisions tending to show that the wording of S. 171, Companies Act, could have been intended to have a different meaning in India from that which had previously been placed upon its meaning.

c In short, while it may be said to be possible to place two different interpretations upon S. 171, Companies Act, it is certainly permissible to hold that it was intended merely to secure that a suit instituted without leave should be stayed until leave was obtained; and of the two possible interpretations I do not think there can be any possible doubt which entails the less injustice. If the correct procedure for the liquidator is merely to apply for the stay of proceedings and it cannot be used as a complete bar to the suit, as already instituted, then it ceases to matter whether the leave is granted before or after the period of limitation prescribed for the institution of the suit has run out or not. As already stated, the period of limitation under S. 3, Limitation Act, dates back to the time of the actual presentation of the plaint unless the suit is regarded as in substance a claim against a company in liquidation, in which case the position will be much the same. For these reasons I would answer the reference by saying that a suit instituted against a company in liquidation without leave should not be dismissed on that ground alone; and, if leave is subsequently obtained, limitation should be calcu-

lated in the same way as if the suit had originally been instituted with leave.

RAM LALL J. — I have had the advantage of reading the judgment of my brother Beckett and I am in general agreement with what he has said. The facts leading up to this reference to a Full Bench briefly are that the Peoples Bank of Northern India Ltd., obtained a decree against Habib Ullah in October 1934. In May 1935, the bank went into liquidation and the liquidator executed the decree against Habib Ullah. Two houses, in which Nazir Ahmad and his brother claimed to be owners of a large share, were attached. On 6th February 1937 Nazir Ahmad made an application to this Court for permission to file objections to the execution and also to bring a declaratory suit. On 5th March 1937, leave to file objections was granted but nothing was said about the prayer for leave to institute a suit. The objections filed were dismissed on 26th May 1937 and without any further application for leave, Nazir Ahmad instituted a suit on 14th June 1937, for a declaration on behalf of himself and his brother. An objection was taken by the defendant that the suit was liable to be dismissed as no leave under S. 171, Companies Act, had been obtained and therefore Nazir Ahmad applied again on 18th February 1938 to this Court for leave and leave was not granted till as late as 24th October 1938, by which date limitation to file the suit had expired, the suit being within time when the second application for leave was made. The trial Court dismissed the suit on 3rd February 1939 holding that the leave having been granted after the limitation for filing the suit had expired, the suit was not maintainable. An appeal to the District Judge and also a second appeal to the High Court failed. An appeal was preferred under the Letters Patent, when the Division Bench hearing this appeal referred to a Full Bench the question whether, if a plaintiff institutes a suit against a company in liquidation without the leave of the Court but applies for such leave within the period of limitation of the suit and if leave is granted but only after the period of limitation has expired, it is necessary for the suit to be dismissed.

The relevant provision of the Indian Companies Act prescribing the obtaining of leave is S. 171 and it enacts that "no suit or other legal proceeding shall be proceeded with or commenced" against a company in liquidation except by leave of the Court. The corresponding provision of the English Companies Act is S. 177 which is worded in identical terms except that in the Indian Act the word "suit" has been substituted for the word "action" appearing in the English statute. The English Act was in force long before the Indian Act and it would appear therefore that the interpretation placed on this provision by Judges in England would have very great weight. If the words of the English statute had been given a particular meaning by the Courts there, and such an interpretation had become a recognized rule of practice, it should be assumed that the same meaning was assigned to those words by statute which borrowed the language of the English statute. Reference may be made in this connexion to the observations of Bittleston J. in 3 M.E.C.R. 384⁹ at p. 390. That being the case, it is desirable at the outset to consider in what sense the provision of S. 177, English Companies Act, has been interpreted in that country. It would appear that the rule there is well established that when an action is commenced without leave against a company in liquidation an application for stay is made

9. ('32) 19 A. I. R. 1932 Bom. 344 : 138 I.C. 824 : 57 Bom. 623 : 34 Bom. L.R. 683, Bhimaji Bhibhutmal v. Chunilal Jhaverchand.

^a to enable leave to be obtained and the action continued. Buckley at page 400 of Edn. 11 of his work on the Companies Act says that "before the Judicature Act, 1873, it was held at law that omission to obtain leave to proceed with an action could not be pleaded as a bar to the further maintenance of the action: application must have been made to the Court in which the winding up was proceeding." The Judicature Acts of 1873 brought about no change in this position. In Palmer's Company Precedents, Edn. 15, the rule of practice is laid down as follows at pp. 391-392: "Where any person acts in violation of S. 177, application should be made to stay or restrain the proceeding. * * * The section was intended to meet the case of unfair attempts to get possession of the assets of a company *in extremis* not to defeat the legal rights of individuals for the benefit of the general body of creditors."

^b In (1893) 2 Q.B. 146,¹ a company in liquidation was seeking to recover costs granted to it and an order was made for the committal of the defendant's failure to pay. Section 87, English Companies Act, 1862, (the language of which is identical with that used in the later English statute on the subject) was pleaded as a bar to the proceedings by the company and Wright L. J. stated the practice on the subject as follows: "That section has always in practice been worked out by applying to stay the proceedings." In (1891) 1 Ch. 305,² a landlord in Scotland had brought a petition for recovery of rent by sequestration without first obtaining leave of the winding up Court and on a construction of S. 81, Companies Act of 1862 it was held that leave could be and was in fact given on terms by North J. to continue the action previously commenced. In (1892) 1 Q.B. 77,³ the goods of a company having been taken in execution after the passing of a resolution of voluntary winding up, it was held that the Court had jurisdiction to stay further proceedings. In (1866) L.R. 1 C.P. 694,⁴ where a plaintiff had sued without previously obtaining leave to proceed against certain contributories of a company in liquidation, and where the Companies Act enacted that no such suit or other legal proceeding shall be commenced except with the leave of the Court, it was held that the omission to obtain such leave could not be taken advantage of by plea to the further maintenance of the action and that an application for stay of proceeding could be applied for.

^d In England the practice appears to be well established that in similar circumstances proceedings are stayed to enable a party to obtain, if he can, the sanction of the Court supervising the liquidation before the suit can be proceeded. The fact that this practice is well established accounts for the paucity of the case-law on the subject. In (1890) 45 Ch. D. 139,⁵ the matter was directly brought under discussion. There a school master had been dismissed by the managers of a charitable trust under the discretionary power conferred on them under S. 17, Charitable Trusts Act, and he sued for an injunction restraining the managers from dismissing him or appointing any other person to the office held by him. Section 17, Charitable Trusts Act, enacted that "before any suit, petition, or other proceeding concerning or relating to any charity, or the estate, funds, property or income thereof, shall be commenced, presented, or taken, by any person whatsoever, there shall be transmitted by such person to the said board, notice in writing of such proposed suit," and the said board would, in their discretion, grant a certificate authorizing the suit or other proceeding and no suit, petition, or other proceeding for obtaining any such relief,

order, or direction as last aforesaid "shall be entertained or proceeded with except upon and in conformity with an order or certificate of the said board." The plaintiff in this case had not obtained a certificate of the Charity Commissioners before he brought the action. Kay J., holding that the certificate was necessary, dismissed the suit. The Court of appeal by majority held that consent was not necessary but it was held unanimously that even if the consent was necessary, it was not necessary to obtain such consent before bringing the action, but that the proceedings should have been stayed to enable the plaintiff to obtain, if he could, the consent of the Commissioners. Cotton L. J. observed:

"No doubt it might save some difficulties and some costs if the rule were established, that there must be this consent before any action could be commenced. But in my opinion the course of the decisions, which we ought not to disturb lightly, has been this that that consent may be obtained after the petition or after the action has been commenced, though of course if it cannot be obtained the result will follow which Kay J. thought he could at once settle, namely that the action will be dismissed."

It will be observed that the wording of S. 17 is emphatic for it is said that the suit, etc. shall not be entertained without leave and yet the Court of appeal held that the proper course, to quote the language of Bowen L. J. was "to allow the action to stand over in order that the blot which has occurred may be cured if possible." Mr. Bhagwat Dayal for the Bank has urged that English practice should not be followed because S. 171, Companies Act, was not taken bodily from the English Statute inasmuch as in the Indian Statute the word "suit" has been substituted for the word "action" in the corresponding statute. The Judicature Acts defined an action to mean a proceeding commenced by a writ. A writ, he urges, is a private document of the plaintiff, whereas in India a suit is instituted on the presentation of a plaint and on this the Court by its own act issues summons to the defendant. It appears to me that there is no substance in the distinction sought to be drawn by learned counsel. The procedure of a writ does not obtain in this country but as soon as a claim is made to a Court, the Court entertains the claim and the suit or action is commenced. In the County Courts in England the procedure is the same as that obtaining in this country. Under the County Courts Act, 1888, an action is defined to include suits and means all proceedings commenced by a plaint. It appears to me that a suit and an action are interchangeable terms so far as the procedure in India is concerned, and when the draftsman borrowed the language of the English section, he substituted the word "suit" for the word "action" because "action" is a term not commonly used in this country. By doing so he was not seeking to introduce a change in the law or to vary its settled meaning which the word of the section so borrowed had acquired in England. When the section was borrowed, the meaning that a uniform course of authority had attached to the words of that section should be taken to have been borrowed with it. In this view of the matter, English authorities on the subject would be a safe guide to the interpretation of this and other analogous sections.

Turning now to the authorities which have construed this and other analogous provisions of law in this country, the first conclusion that emerges is that there is a certain amount of conflict in the various High Courts. I will deal first with the authorities which have dealt with the provisions of the Companies Act and then examine authorities in

^a which a similar language in other statutes has been considered. In 52 All. 430⁶ a suit was commenced against a liquidator without previous leave but leave was obtained during the pendency of the suit. This leave was not treated as a nullity. It was observed that the grant or withholding of leave was a matter for the Company Judge and if the Sub-Judge, who tried the suit, regarded the leave granted by the Company Judge as a nullity, he would in effect be sitting as a Court of appeal against the decision of the Company Judge, who in the case under consideration now is a Judge of the High Court. It is true that in this case part of the reasoning adopted was that when leave was granted, the suit was still within time and that no objection could, therefore, be taken to the institution of a fresh suit. This consideration, however, does not appear to me to make any difference. If the section is to be so construed that the grant of leave is a condition precedent to the institution of a suit, all proceedings taken up to the time of the grant of leave are a nullity and could not be validated later. I propose to revert to this matter later when dealing with some decisions of our own Court—suffice it to say here that the consideration whether leave was granted before or after the suit was instituted does not make any essential difference.

^b In 40 C. W. N. 312¹⁰ Panchridge J. restrained a plaintiff from proceeding with a suit which he had brought in a subordinate Court without his having first obtained leave of the winding up Court. No leave apparently had been applied for but a suggestion was made to the Judge to postpone the application before him to enable the plaintiff to obtain leave. The learned Judge made observations which imply that leave must be obtained first and then proceedings commenced or proceeded with and that therefore the Court had no jurisdiction to grant leave so as to validate proceedings taken up to date. The learned Judge in observing that leave in such circumstances would be a nullity has given no reasons and has not referred to any earlier authority or to the practice and the decisions in England on the subject. In A. I. R. 1940 Cal. 166¹¹ the same Judge again considered this question. Without any discussion the learned Judge followed the view he had previously expressed in 40 C. W. N. 312¹⁰ and regarding decisions of other Courts on the subject he observed as follows :

^c "It has been pointed out to me that the opposite view has been taken in the Allahabad High Court and in the Bombay High Court, though it seems to me that my view has commended itself to the Lahore High Court. There is clearly no authority binding on me which compels me to modify the opinion I expressed in 40 C. W. N. 312.¹⁰ On the authority of that case I feel constrained to accede to the liquidator's application."

^d It appears to me that the Lahore High Court has not so far fully endorsed this view and in any case the dictum of the learned Judge without the slightest attempt at discussion is not helpful in solving this problem. In the Lahore High Court the only decision under the Companies Act that deals with the matter is reported in A. I. R. 1936 Lah 401.⁶ Here, leave to appeal to the Privy Council was applied for on 2nd April 1935, citing as respondents a company which was being wound

^e up by the Court. When the application was made, no previous leave of the Liquidation Court had been obtained but leave was granted in October 1935 long after the period of limitation for such an application had expired. It was objected that the application was incompetent in view of the provisions of S. 171, Companies Act. Counsel for the applicant contended on the authority in 52 All. 430⁶ and 57 Bom. 623⁹ that leave could be obtained subsequently and that the only effect of the failure to obtain leave was that proceedings should be stayed till leave was obtained. The two cases cited were distinguished on the ground that no question of limitation was involved. The learned Judges observed:

^f "If a suit has been instituted without such leave, but such leave has been obtained within the period of limitation, it would obviously be useless to dismiss the suit and to compel the plaintiff to bring another suit after obtaining the leave."

The leave in this case not having been obtained within limitation, the petition was rejected and it was finally said that no contention was raised that this was a fit case in which time could be extended, if possible. With very great respect it appears to me that the learned Judges distinguished the two cases cited on erroneous and illogical grounds. If the grant of leave by the Liquidation Court is to be regarded as a condition precedent to the institution of a suit or proceeding on the correct interpretation of S. 171, Companies Act, then all proceedings instituted without such leave would be a nullity. In law such proceedings would have no existence. If such proceedings be a nullity, the grant of subsequent leave could not invest this nullity with a content and a meaning and therefore could not validate what in law did not exist. The argument that it would be useless to compel the plaintiff to bring another suit also appears to me to be illogical. If the law demands that only a new suit after satisfying obligatory conditions is the only valid way of proceeding, then no consideration based on the convenience of parties can avoid the obligations imposed by law. In this view of the matter it appears to me that A. I. R. 1936 Lah. 401⁶ has been wrongly decided.

^g There are no other cases that deal directly with the Companies Act. It would seem from the above discussion that whereas the Calcutta view is in conflict with the Allahabad view, the former Court has given no reasons in support of its view and in Lahore the grant of subsequent leave has not been treated as a nullity though the distinction drawn between the grant of leave before or after the limitation had run out has no logical basis. In no decision of the three Courts given under the Companies Act was reference made to English authority on the recognized practice of the English Courts. It appears to me that had the Calcutta and the Lahore Courts considered this practice, the decision would have been in conformity with the Allahabad view. There are a number of decisions under other provisions which require the sanction of some authority before the institution of, or proceeding with, suits. In dealing with these analogous provisions I will first deal with the decisions under the Presidency Towns Insolvency Act and the Provincial Insolvency Acts.

^h In the Bombay Court, decisions under the Insolvency Acts are not uniform but the current of authority seems to favour the view that subsequent leave will not validate proceedings. In 40 Bom. 235¹²

10. ('35) 40 C. W. N. 312, In re Steel Construction Co. Ltd.

11. ('40) 27 A. I. R. 1940 Cal. 166; 187 I. C. 880; I. L. R. (1939) 2 Cal. 425, Harnarain Misra v. Kanhaiyalal Lohawala.

12. ('15) 2 A.I.R. 1915 Bom. 134; 31 I.C. 948; 40 Bom. 235; 17 Bom. L. B. 925, In re Dwarkadas Tejchandras Narsoomal Gokaldas.

a Davar J. held that the leave contemplated by S. 17, Presidency Towns Insolvency Act, before commencing any suit must be obtained before the suit is filed and that leave cannot be obtained subsequently. This decision was based on a construction of the language of the section which the learned Judge held was so plain that no other construction was possible. The relevant part of the section said: "No creditor shall commence any suit except with leave." In A. I. R. 1932 Bom. 338¹³ Blackwell J. followed Davar J.'s view and held leave to be a condition precedent to the institution of a suit, but there is little or no discussion on the subject beyond basing the decisions on what appeared to the learned Judges to be the plain construction of the section.

In 57 Bom. 623,⁹ however, Tyabji J. refused to follow this view in a lengthy judgment in which he had to construe the analogous provisions of S. 28, Provincial Insolvency Act. He held that a suit instituted without leave need not necessarily be dismissed and that the Court had power to stay it or to allow it to proceed on terms. In arriving at this conclusion, he drew support from the construction that had been placed in English decisions on the analogous provisions of the Companies Act. He observed that there were numerous decisions in England under the Companies Act, yet no case had been pointed out in which the Court had considered itself bound under these sections to dismiss an action because leave had not been obtained at its commencement and the Court had merely refused to give leave to proceed. The learned Judge proceeded on the rule that when a particular expression or form of legislative enactment has been construed in a superior Court or by a long course of practice received an authoritative interpretation, and it is then repeated in a subsequent statute, the Legislature must be taken to adopt the meaning put upon it by the Court and to use it according to that meaning. The learned Judge in this case refused to follow the decision of Davar J. which has been noticed already and which was followed by Blackwell J. in A. I. R. 1932 Bom. 338.¹³

In I.L.R. (1939) Bom. 493¹⁴ Beaumont C.J. preferred the view of Davar J. to that of Tyabji J. in 57 Bom. 623,⁹ but based himself like Davar J. on a construction of the language of S. 28, Provincial Insolvency Act, without attempting to meet the arguments and the reasoning advanced by Tyabji J. Before leaving the Bombay Court decisions, reference may be made to a decision by Fawcett J. reported in A.I.R. 1929 Bom. 398¹⁵ where the learned Judge stayed a creditor's suit against an insolvent filed after the order of adjudication even though no leave had been obtained previously. Reference may also be made in this connexion to 41 Bom. 312¹⁶ where Scott C. J. delivering the judgment of the Division Bench held that the language of S. 18, Presidency Towns Insolvency Act, was wide enough to justify a stay of proceedings in an action which was not pending at the time of the order of adjudication. The learned Judge followed the interpreta-

tion placed on the analogous provisions of S. 10 of the English Bankruptcy Act, in (1887) 58 L.T. 85.¹⁷ The basis of this decision adopting as it does the interpretation in England of a provision which was later borrowed in this country lends forcible support to the view that the construction placed in English Courts on analogous provisions of the Companies Act should also be followed here.

It would thus appear that in the Bombay Court opinion is divided on the question under reference in so far as the provisions of the Insolvency law are concerned. Some of the decisions are difficult to reconcile but it appears to me that the correct view is that a suit should not be necessarily dismissed and can in a suitable case be stayed on terms. In the Madras Court also there is some divergence of opinion on the construction of provisions in the Insolvency law relating to leave before instituting proceedings. In A. I. R. 1927 Mad. 869¹⁸ it was held by a Division Bench that under S. 75 (3), Provincial Insolvency Act, it was not necessary that the appellant must apply for leave prior to filing the appeal in the High Court. Leave, it was held, could be and frequently had been granted with retrospective effect. The same Division Bench however in a case reported in 51 Mad. 833¹⁹ held following Davar J.'s decision in 40 Bom. 235¹² that under S. 28, Provincial Insolvency Act, the obtaining of leave was a condition precedent to the suit and failure to obtain such leave could not afterwards be cured.

In A. I. R. 1929 Mad. 480²⁰ the above decision was followed by Wallace J., but the same Judge a little later in a case reported in A.I.R. 1929 Mad. 323,²¹ when sitting with Tiruvengkatchariyar J. in a Letters Patent appeal, took a different view holding that the prohibition was merely a restraint on the exercise of jurisdiction and could be waived. In I. L. R. (1937) Mad. 841,²² however, the earlier view expressed in A. I. R. 1929 Mad. 480²⁰ was followed largely on the basis that the plain construction of the section was consistent only with this view. In the Allahabad Court a conflict is reflected in 52 All. 430,⁶ noticed already, and in I. L. R. (1937) All. 344.²³ In the latter case a distinction was made in cases where limitation had and those where it had not expired. But as I have said already in discussing the Lahore case reported in A.I.R. 1936 Lah. 401⁵ such a distinction is illogical and unsound. Reference was made prominently in the course of arguments to a decision of the Lahore High Court reported in 8 Lah. 593²⁴

13. ('32) 19 A.I.R. 1932 Bom. 338 : 138 I. C. 788 : 34 Bom. L.R. 649, Maya Ookeda v. Kuverji Kurpal.
14. ('39) 26 A.I.R. 1939 Bom. 344 : 185 I. C. 542 : I.L.R. (1939) Bom. 493 : 41 Bom. L.R. 538, Jahan-gir Qureshjee v. Kastur Pannaji.
15. ('29) 16 A.I.R. 1929 Bom. 398 : 120 I. C. 840 : 51 Bom. L. R. 981, Bheraji Samrathji & Co. v. Yashntrao Govindrao.
16. ('16) 3 A.I.R. 1916 Bom. 180 : 32 I.C. 694 : 41 Bom. 312 : 18 Bom. L. R. 198, Mahomed Haji Bawa v. Abdul Rahiman.

17. (1887) 58 L. T. 85, Brownscombe v. Fair.
18. ('27) 14 A.I.R. 1927 Mad. 869 : 105 I. C. 138 : 50 Mad. 815 : 53 M. L. J. 742, M. W. Elliot, Official Receiver, Cuddappah v. Subbiah.
19. ('27) 14 A.I.R. 1927 Mad. 925 : 105 I. C. 109 : 51 Mad. 833 : 53 M. L. J. 412, Ghous Khan v. Bala Subba Rowther.
20. ('29) 16 A.I.R. 1929 Mad. 480 : 118 I. C. 550, Ponnusami Chettiar v. Kaliaperumal Naicker.
21. ('29) 16 A.I.R. 1929 Mad. 323 : 119 I. C. 46 : 56 M. L. J. 499, Subramanyam v. Narasimham.
22. ('37) 24 A.I.R. 1937 Mad. 667 : 173 I. C. 285 : I. L. R. (1937) Mad. 841 : 1937-2 M. L. J. 223, Davood Mohideen v. Sahabdeen Sahib.
23. ('37) 24 A.I.R. 1937 All. 271 : 168 I. C. 939 : I.L.R. (1937) All. 344 : 1937 A. L. J. 94, Sarju Prashad Bhagwati Prasad Sah Firm v. Rajendra Prasad.
24. ('28) 15 A.I.R. 1928 Lah. 28 : 102 I. C. 37 : 8 Lah. 593 : 28 P. L. R. 634, Panna Lal Tassadug Hussain v. Hira Nand Jivan Ram.

where a suit was brought without leave three years after the order of adjudication but in ignorance of this order, it was held that the suit had been rightly dismissed because it had been brought without the permission of the Insolvency Court. It was contended that the Lahore view was that this authority laid down that leave was to be regarded as a condition precedent to the institution of a suit. It will be observed, however, that in that case no leave had been asked for at any stage and the question whether if the leave had been granted what would have been the effect of so granting leave, did not arise and could, therefore, not be considered.

On a general review of the cases under the Insolvency law the current of authority appears to have been in favour of the view that leave subsequently granted will not validate proceedings taken previously. There are weighty judgments in all the High Courts which have taken and expounded the contrary view. The position, therefore, cannot be said to be settled. My own view is that both under the Companies Act, and under the Insolvency Acts proceedings taken without leave are not necessarily a nullity. It is a matter for the Court to whom an application for leave has been made to decide on all the circumstances placed before it whether or not it should grant leave. If leave has been granted by that Court in regard to a suit commenced without leave, the proceedings are not a nullity and further that whether leave was granted before the period of limitation had run out on the filing of the suit or afterwards, makes no difference at all. In this view it appears to me that cases where it has been held that a suit must necessarily be dismissed because it was commenced without leave though leave was subsequently granted proceed on erroneous grounds. Whatever be the position under the Insolvency law, however, in view of the diversity of opinion in the different High Courts it would be unsafe to draw analogies from decisions under the Insolvency law and make these analogies the basis of decision under the Company law even though there is a great similarity of language in the relevant sections in the two Acts.

The above remarks will apply with even greater force to decisions under other Acts where the similarity of language is not so marked. An examination of these decisions would at best illustrate the conflict of view. In this connexion reference has been made to S. 69, Partnership Act, which bars a suit by a firm unless it had been previously registered. In A. I. R. 1938 Mad. 688²⁵ the subsequent registration of a firm was held not to validate proceedings by an unregistered firm. A different view, however, was taken in A. I. R. 1937 Mad. 767²⁶ and in 41 C.W.N. 534.²⁷ In some cases the grant of leave has been regarded as the foundation of jurisdiction and a condition precedent to the institution of a suit and subsequent leave has been held not to validate proceedings. Where the remedy is barred till the happening of an event like the grant of leave, subsequent leave when granted will lift that bar. It seems to me that even under the Partnership Act the better opinion is that as a matter of procedure the remedy which is available is withheld till a

condition is complied with and that the grant of leave by the Court is such a condition. The right to enforce a claim is granted by a decree and if the condition for the enforcement of that remedy is complied with before the grant of a decree, it makes no difference whether this condition is complied with before or after the institution of a suit so long as it is complied with before the decree is made. It is of course for the Court granting leave to decide whether the conduct of the applicant or other circumstances are such that leave should not be granted. Once, however, leave has been granted, an absolute rule should not be laid down that all proceedings are a nullity up to the time of the granting of such leave because, as observed in an English case the Courts exist for doing justice between parties and not merely to enforce rules of procedure.

There is one decision of the Lahore Court to which prominent reference was made. In A. I. R. 1938 Lah. 787²⁸ Skemp J. held that a suit by an unregistered firm was invalid and that registration after the suit had been instituted did not relate back so as to make the suit valid. The learned Judge relied on 17 Lah. 275²⁹ in arriving at his decision. In 17 Lah. 275,²⁹ however, it appears that the plaintiff firm was not registered even at the time when the decree was made and all that the decision, therefore, lays down is that a suit by an unregistered firm while unregistered is not maintainable. It is true that it was urged in arguments before the learned Judges that the suit should have been stayed to enable the plaintiff firm to get itself registered, but it is clear that the firm did not get itself registered at all and therefore the expression of opinion that S. 69 did not provide for the procedure of stay and that, therefore, the institution of the suit before registration was barred is obiter only. Skemp J., however, went on to say that in the case before him the certificate of registration had not been placed on the record of the civil suit up to the date even of his decision. What the effect would have been on the decision had the certificate of registration been so filed, it is difficult to say.

The other provisions from which analogies were sought to be drawn in arguments were Ss. 80, 86 and 92, Civil P. C. Section 80 requires that a suit shall only be instituted after the expiry of two months from the date of the delivery of a notice of claim and the plaint shall state that such notice has been so delivered. The section has been held to be explicit and mandatory and as admitting of no implications or exceptions. If the requirements of the section have not been fulfilled, there is no proper plaint before the Court. Without the statement that the notice has been delivered, the suit from the statement in the plaint itself would appear to be barred and so the plaint has to be rejected under O. 7, R. 11 (d) of the Code. In this view of the matter, no useful analogy can be drawn from decisions under S. 80, Civil P. C. Section 86, Civil P. C., requires the consent of the Governor-General before any Indian Prince, ambassador or envoy can be sued. The analogy drawn from the language of this section is not helpful because in the first place no case has been cited where consent has been given subsequent to the institution of a suit and has been held not to validate proceedings previous to

25. ('38) 25 A. I. R. 1938 Mad. 688 : 179 I. C. 16 : 1938-2 M. L. J. 44, Girdhari Lal Son & Co. v. B. Kappini Gowder.

26. ('37) 24 A. I. R. 1937 Mad. 767 : 176 I. C. 916 : 1937-2 M. L. J. 273, Vardarajulu Naidu v. Raja Manika Mudaliar.

27. ('37) 41 C. W. N. 534, Radha Charan Saha v. Matilal Saha.

28. ('38) 25 A. I. R. 1938 Lah. 787 : 179 I. C. 563 : 40 P. L. R. 667, Ohagan Lal v. Mangal Sain Raj Narain (Firm).

29. ('35) 22 A. I. R. 1935 Lah. 893 : 160 I. C. 513 : 17 Lah. 275 : 38 P. L. R. 683, Krishan Lal-Ram Lal v. Abdul Ghafor Khan.

^a the grant of that leave. In 39 Mad. 661,³⁰ the only authority referred to in arguments, no subsequent consent was either applied for or refused. Further it is debatable whether want of consent can be waived. If it can be waived, the provision ceases to be a condition precedent that goes to the root of the jurisdiction of the Court, for neither the waiver by, nor consent of, a party can confer on a Court jurisdiction which does not otherwise exist.

Then again under S. 92, Civil P. C., two or more persons interested in a trust are required to obtain the consent of the Advocate-General before they can institute a suit in connexion with the trust. The analogies have not been helpful because a person who has not obtained the consent is not competent to sue and thus the want of consent goes to the root of the jurisdiction of the Court. Nevertheless, there are conflicting decisions even under this section on the question whether amendment of a ^b plaint defective for want of sanction can be allowed with the subsequent consent of the Advocate-General. Reference in this connexion may be made to 26 All. 162³¹ and 80 Bom. 608³² on the one side and 10 Mad. 185³³ and 43 Mad. 720³⁴ on the other. Analogies were sought to be drawn from the provisions of the Pensions Act, the Deccan Agriculturists Relief Act and Cl. 12, Letters Patent of the Presidency High Courts and decisions given thereunder. Some of these decisions tend to support the conclusion I have arrived at though as I propose to show the analogies drawn from these provisions, as the analogies drawn from certain provisions in the Civil Procedure Code, are not very apt. Under S. 6, Pensions Act, 1871, a civil Court can take cognizance of a claim relating to a pension only upon receiving a certificate from the Collector, yet it has been held in 17 Bom. 169³⁵ that where a plaint had been presented without the certificate, the suit was not bad ab initio and the Court was only precluded from taking cognizance of the suit till the certificate was produced, and that the trial Court should on having been asked to do so have adjourned the case for the production of a certificate.

Under S. 47, Deccan Agriculturists Relief Act, no suit to which an agriculturist is a party shall be entertained by a civil Court unless the plaintiff produces a certificate from a conciliator appointed under the Act. It was held in 7 I. C. 986,³⁶ however, that the production of a certificate was not a condition precedent to the maintenance of the suit. The Court had jurisdiction to allow the suit but not to hear it till the certificate was produced. The question of the construction of words which may ^d be said to have acquired a special meaning before their being interpreted in a statute was not discussed in either of the two decisions cited above under the Pensions Act and the Deccan Agriculturists Relief Act.

30. ('16) 3 A. I. R. 1916 Mad. 835 : 30 I. C. 511 : 39 Mad. 661 : 29 M. L. J. 687, Narayana Moothad v. The Cochin Sircar.

31. ('03) 26 All. 162 : 1908 A. W. N. 227, Gopal Dei v. Kanno Dei.

32. ('06) 30 Bom. 608 : 8 Bom. L. R. 751, Darves Haji Mahamad Sidik v. Jainudin.

33. ('87) 10 Mad. 135, Ramayyengar v. Krishnayyengar.

34. ('20) 7 A.I.R. 1920 Mad. 184 : 56 I. C. 450 : 48 Mad. 720 : 38 M. L. J. 504, Jakkam Reddi v. Subramania Aiyar.

35. ('98) 17 Bom. 169, Jijaji Pratapji Raju v. Balakrishna Mahadeo.

36. ('90) 12 Bom. L. R. 801 : 7 I. C. 986, Bando Subbaro v. Jambu Tarnappa.

turists Relief Act and therefore no useful analogy can be afforded by these decisions. The same applies to decisions such as A. I. R. 1934 Bom. 91³⁷ and 44 C.W.N. 604³⁸ given under Cl. 12, Letters Patent of the Presidency High Courts which requires the leave of the Court in certain cases before the Court can "receive, try and determine" certain classes of suits. In these two cases where a plaint was presented without leave it was held that the suit had been validly instituted within the period of limitation though leave was obtained subsequently after the period of limitation for the institution of the suit had expired.

On the whole, it seems to me that having regard to the course of decisions in England under the English Companies Act and under the English Bankruptcy laws and the fact that the provisions of S. 171, Indian Companies Act, an analogous provision of the Presidency Towns Insolvency Act and the Provincial Insolvency Act, were taken bodily from the corresponding English Statutes, it must be held that the words in question had acquired a technical meaning in England and that when these words were brought into use in the corresponding Indian Statute they must be deemed to have been given the same meaning here as in England. In this aspect of the matter, I would hold that a suit instituted against a company in liquidation without the leave of the Court should not necessarily be dismissed even if the leave was granted after the period of limitation for the institution of the suit had expired. Each case must be dealt with on its own merits.

TEK CHAND J. — I agree in the answer proposed by my learned brethren.

G.N./R.K.

Answer accordingly.

37. ('34) 21 A.I.R. 1934 Bom. 91 : 148 I. C. 1038 : 36 Bom. L. R. 84, Ram Gopal Chunilal v. Ram Swarup Baldevdas.

38. ('40) 44 C. W. N. 604, Suproakash Chandra Mitra v. Amullya Chandra Ghosh.

*** A. I. R. (29) 1942 Lahore 296

FULL BENCH

DALIP SINGH, BHIDE AND
RAM LALL JJ.

Emperor

v.

Ghulam Mohammad s/o Dost Mohammad Khan — Accused — Respondent.

Criminal Appeal No. 601 of 1940, Decided on 14th July 1941; case referred to Full Bench by Bhide and Ram Lall JJ., D/- 28th May 1941.

** (a) Criminal P. C. (1898), Ss. 421, 422, 423 — Appeal admitted — Neither accused nor Crown can withdraw — Court is bound to decide appeal on merits (Per Full Bench).

The Legislature have never contemplated any withdrawal of an appeal once lodged, whether by the accused or by the Crown and once the appeal has been lodged and admitted, it is not in the power of any Court nor in the power of the appellant to allow the appeal to be withdrawn. The Court is bound once the appeal is admitted to proceed under S. 421 or under Ss. 422 and 423 to decide the appeal on the merits. (38) 25 A. I. R. 1938 Lah. 741.

Disting.; ('35) 22 A.I.R. 1935 P. C. 89; 6 C. L. R. 427 and 5 C. L. R. 372, *Ref.* [P 298c,d]

Cr. P. C. —

('41) Chitaley, S. 423, N. 8.

* (b) Criminal trial—Appeal to High Court—Withdrawal of, refused by Division Bench—Another Division Bench cannot at instance of other party come to contrary conclusion (*Per Full Bench*).

A Division Bench having decided that permission to withdraw an appeal could not be granted and the appeal should be heard on the merits, another Division Bench cannot come to a contrary conclusion at the instance of the party adversely affected by the first order but neither present nor represented when the order refusing withdrawal was made. [P 298d,e]

Cr. P. C. —

('41) Chitaley, S. 423, N. 8.

* (c) Criminal trial — Appeal by Crown — Crown absent—Court can allow complainant's counsel as such or *amicus curiae* to place case before it (*Per Division Bench in Final Order*).

The Court can always ask any lawyer practising in that Court to assist it in the decision of a matter before it where the Crown is not before the Court; and, whether as complainant's counsel or as *amicus curiae* the Court considers it desirable to obtain the assistance of a counsel engaged by the complainant in placing the facts before the Court, it can so allow the counsel to appear. [P 298f,g]

Cr. P. C. —

('41) Chitaley, S. 4 (1) (r), N. 1; S. 340, N. 1 Pts. 8, 9; S. 493, N. 2; S. 495, N. 2.

('41) Mitra, Page 1605, N. 1301.

Harnam Singh and S. M. Sikri as amicus curiae.

Sheikh Mohammad Amin for Advocates-General — for Respondent.

DALIP SINGH J.—One Ghulam Mohammad was convicted by the District Magistrate, Attock, on a charge under S. 304 and Ss. 147 and 149, Penal Code. He was acquitted on appeal by the learned Sessions Judge. An appeal was filed by the Punjab Government against the order of acquittal. The appeal was admitted to a hearing and notice to the respondent with a warrant for his arrest issued on 14th May 1940. On 5th June 1940, the Advocate-General preferred an application under S. 561A, Criminal P. C., stating that the Punjab Government had reconsidered its decision to appeal and asked permission to withdraw the appeal. On 11th July 1940, the Division Bench hearing the application refused withdrawal. The respondent, Ghulam Mohammad was neither present nor represented at this stage. The appeal came up for hearing. The Crown was not represented but the respondent appeared and took up the position that the order refusing withdrawal was without jurisdiction and moreover it could not have been passed and should not have been passed in his absence as a valuable right had accrued to him once the Government had intimated its desire to withdraw the appeal. The Division Bench hearing the appeal has referred to the Full Bench two questions formulated by it, namely, (1) whether a Division Bench having decided that permission to withdraw could not be granted and the appeal should be heard on the merits, could another Division Bench come to a contrary conclusion at the instance of the party adversely affected by the first order but neither present nor represented when the order refusing

withdrawal was made, and (2) whether when the appellant intimates to the Court his desire to withdraw the appeal, the Court is bound to dismiss the appeal even though some proceedings have been taken by the Court in the course of the disposal of his appeal.

The case has been argued by the learned counsel for the respondent Ghulam Mohammad and at our request Sardar Harnam Singh and Mr. S. M. Sikri, Advocates, have argued the case for the other side as *amici curiae*. The contention of the learned counsel for Ghulam Mohammad is briefly this: The appellate Court only gets jurisdiction to hear the appeal as a result of the appellants filing the appeal. The appellant is under no obligation to file an appeal and it follows therefrom that the appellant has always the right to withdraw his appeal whenever he so chooses. Therefore, at any time, before judgment is pronounced the appeal can be withdrawn. He relied to a certain extent on 5 C. L. R. 372¹ where a Division Bench of the Calcutta High Court held under the terms of the old Criminal Procedure Code that if an appellant wished to withdraw his appeal before it had been admitted by the Court, the appellant had an absolute right to do so and the Court could not insist on admitting the appeal. Against this there is another ruling 6 C. L. R. 427² which appears to hold that once an appeal has been admitted, then it is a matter for the discretion of the Court whether to allow withdrawal or not and that the appellant could not withdraw the appeal once the Court had perused the evidence or a part of it or taken some other action with respect to an admitted appeal. The learned counsel also relied on 1 Cr. L.J. 751,³ a Nagpur case, where Stanyon J., made some obiter dicta in which he appeared to endorse the view of the Calcutta High Court in 5 C. L. R. 372¹ but extended it generally holding that the appellant had an absolute right to withdraw the appeal at any time before judgment was pronounced. The learned counsel also relied on Halsbury's laws of England, Art. 399, p. 273, Vol. 9, where it is stated that in England as soon as notice is given of the abandonment of an appeal, the appeal stands dismissed. It is clear that all this argument rests on the fundamental proposition that as there is no obligation to appeal, the right to withdraw must always accompany the right to file an appeal. On the correctness of this proposition the whole basis of this argument rests. The question, therefore, is whether this proposition is correct or not.

The learned counsel, Sardar Harnam Singh, has pointed out that this is not so. He refers to (1936) 1 K.B. 487⁴ at p. 500 which was followed in A.I.R. 1938 Lah. 741,⁵ an income-tax case, where it was held that as the Assistant Commissioner of Income-tax has on appeal a right to enhance an assessment therefore once an appeal has been lodged before the Assistant Commissioner, there being no provision for any right to withdraw the appeal, the appeal cannot be withdrawn by the appellant. It is true that the Income-tax Act is a special Act both in England

1. ('80) 5 C.L.R. 372, *In re Chunder Nath Deb*.
2. ('80) 6 C.L.R. 427, *In re Dwarka Nath Manjhee*.
3. ('04) 1 Cr. L. J. 751; 17 C.P.L.R. 97, *Emperor v. Shaikh Rasul*.
4. (1936) 1 K.B. 487; 105 L.J.K.B. 759; 154 L.T. 198; 79 S.J. 941; 52 T.L.R. 143, *Rex v. Income-tax Special Commissioner; Ex parte Elmhirst*.
5. ('38) 25 A. I. R. 1938 Lah. 741; 179 I. C. 490; 1 L. R. (1938) Lah. 359; 41 P.L.R. 64, *Commissioner of Income-tax v. Shah Nawaz Khan*.

and in this country but the principle of law appears to be that it by no means follows that because there is no obligation to appeal, yet when an appeal has once been lodged, a right to withdraw the appeal must co-exist with the right to file an appeal. Further, the English practice about criminal appeals is not based on any rule of practice or on any general principle of law but, as pointed out by Sardar Harnam Singh, is provided for by statutory rules made under S. 18 of the Act, R. 23 of which states expressly that if an appeal is abandoned, it shall be treated as dismissed. He points out rightly in my opinion that if this was a general principle of law, there would be no need for any statutory recognition of that fact. He also points out that 6 C.L.R. 427² really differs from 5 C.L.R. 372.¹ At any rate it is against the contention of the respondent that up to the stage of judgment the appellant can at all times withdraw his appeal.

Further, Sardar Harnam Singh relies on 62 Cal. 983⁶ at pp. 989 and 990, where their Lordships of the Privy Council point out that Chap. 81, Criminal P. C., completely deals with the rights of the appellate Court and that once an appeal has been admitted and has not been summarily dismissed under S. 421, then the powers of the appellate Court are limited by S. 423 which makes it obligatory upon the appellate Court to peruse the record and come to whatever decision it would come to on the evidence led in the case. It is curious that no provision has been made for the withdrawal of the appeal; and this of course might be explained on the ground that the Legislature could never have contemplated that the Executive Government, which has six months to make up its mind whether to appeal or not, would, after making up its mind to appeal and without the discovery of any new facts, subsequently come to a contrary conclusion and decide not to appeal. But be that as it may, the fact remains that while provision is made for withdrawal of trials (see Ss. 240, 248, 333 and 494, Criminal P. C.) no provision is made for the withdrawal of appeals. In each of these sections except S. 333 the consent of the Court is necessary before a withdrawal is allowed. In S. 333 the Advocate-General no doubt is given power to enter a *nolle prosequi* without the leave of the Court but it is provided that such an action does not involve an acquittal but only a discharge of the accused.

From all these considerations, it appears clear to me that the Legislature have never contemplated any withdrawal of an appeal once lodged whether by the accused or by the Crown and that once the appeal has been lodged and admitted, it is not in the power of any Court nor in the power of the appellant to allow the appeal to be withdrawn. The Court is bound once the appeal is admitted to proceed under S. 421 or under Ss. 422 and 423 to decide the appeal on the merits. I, therefore, consider that there is no force in the second contention raised by the respondent and would answer the second question referred to the Full Bench in the negative. The first question formulated does not really therefore arise since the Court had no power to allow any withdrawal at a stage when the appeal had been duly admitted to a hearing. The mere fact that the respondent was not heard would at most be an irregularity. The decision of the Court, that is, of the Division Bench, refusing permission to withdraw the appeal was correct and if that were

so, since no new facts have today come to light as to why the appeal should be allowed to be withdrawn, the respondent has no right to urge that the appeal must be allowed to be withdrawn. I would, therefore, answer the first question referred to the Full Bench also in the negative.

BHIDE J. — I agree.

RAM LALL J. — I agree.

[The case came before the Bench of Ram Lall and Sale JJ., when the following judgment was delivered on 23rd December 1941.]

[After stating facts their Lordships proceeded.] At the hearing the Crown did not appear before us. Mr. Bhagat Ram Puri, briefed by one of the persons who was injured in the riot which is the subject-matter of the charge has appeared before us in support of the appeal, while Ghulam Mohammad respondent has again been represented by Khan Sahib Mohammad Amin. An objection which was taken at the outset by Khan Sahib Mohammad Amin was that the Crown having decided to take no interest in the appeal, a private complainant had no locus standi and that therefore we should not hear Mr. Bhagat Ram Puri. It appeared to us that a person who was himself injured in a riot has got a sufficient interest to move the Court with a view to the conviction of persons who took part in that riot. Whether however, Mr. Puri as representing the complainant has a status to appear before us or not is a matter of purely academic interest because the Court can always ask any lawyer practising in that Court to assist it in the decision of a matter before it. In the present case, the Crown is not before us and whether as complainant's counsel or as *amicus curiae* we consider it desirable to obtain the assistance of Mr. Puri in placing the facts before us and in the circumstances we overrule the preliminary objection raised by Khan Sahib Mohammad Amin. (After discussing the merits of the case, their Lordships accepted the appeal.)

R.K.

Appeal accepted.

A. I. R. (29) 1942 Lahore 298

FULL BENCH

TEK CHAND, BHIDE AND DIN
MOHAMMAD JJ.

Ishar Das — Plaintiff — Appellant

v.

Nur Din — Defendant — Respondent.

Second Appeal No. 139 of 1941, Decided on 14th July 1942; Case referred to Full Bench by Din Mohammad J., D/- 13th January 1942.

Punjab Registration of Money-Lenders' Act (3 of 1938), S. 3—Plaintiff obtaining certificate after filing of suit but before decree — Suit cannot be dismissed.: S. A. No. 448 of 1940, **OVERRULED.**

The Act applies only to suits instituted after the date on which it came into force. [P 299g]

Where the plaintiff has been registered as a money-lender and holds a licence before the passing of the decree, he satisfies the requirements of the law and his suit is not liable to dismissal under S. 3 although the plaintiff had no such certificate at the time of the institution of the suit: S. A. No. 448 of 1940, **OVERRULED.** [P 300g]

Narotam Singh Bindra for A. N. Chona — for Appellant.

M. L. Mehra — for Respondent.

6. (35) 22 A. I. R. 1935 P.C. 89 : 155 I.C. 386 : 62 L.A. 109 : 62 Cal. 983 : 34 Cr. L. J. 838 (P. C.), Emperor v. Dattu Bant.

2 TEK CHAND J. — This reference to the Full Bench has arisen in the following circumstances : By a deed executed on 1st May 1938 the defendant-mortgaged his house to the plaintiff-appellant. On 29th April 1940 the plaintiff instituted a suit against the defendant for recovery of the amount due on foot of the mortgage. About nine months before the institution of the suit, the Punjab Registration of Money-Lenders Act had come into force on 1st July 1939 but the plaintiff had not got himself registered or licensed before the institution of the suit. The defendant pleaded (1) that the suit was liable to be dismissed under S. 3 of the Act as the plaintiff was a money-lender and had not been registered or licensed as required by the Act; and (2) that the amount due on the mortgage had been repaid, and nothing was outstanding against him. The plaintiff denied that he was a money-lender and, therefore, S. 3 of Act 3 of 1938 did not apply. b On the merits he traversed the plea that the amount due had been repaid by the defendant. On these pleadings the trial Judge framed the following issues :

1. Has the defendant paid off the mortgage amount ?
2. Is the plaintiff a money-lender ?
3. If so, can the plaintiff get a decree without a money-lender's license ?
4. Relief.

c During the pendency of the suit the plaintiff applied to the Collector for registration as a "money-lender" and for grant of a license under Act 3 of 1938. He was registered on 3rd July 1940 and the license was also granted to him on the same day. On 15th July 1940 he produced the license before the Subordinate Judge. The trial of the suit then proceeded on the merits and on 22nd August 1940 the Subordinate Judge granted the plaintiff a preliminary mortgage-decree in terms of O. 34, R. 4. He held that the plaintiff was a money-lender, that though he had not got himself registered or obtained a license before the institution of the suit, he had fulfilled the requirements of the law by getting himself registered and licensed during the pendency of the suit and by production of the license before the decree. On issue 1 he found that the alleged repayment had not been proved. The defendant appealed to the Senior Subordinate Judge who held that the suit was liable to dismissal as the plaintiff had not been registered and licensed before the institution of the suit. In his view the subsequent registration and licensing of the plaintiff, even though it was before the decree, was of no effect. d On this ground he accepted the defendant's appeal and dismissed the suit without going into the question of repayment.

The plaintiff preferred a second appeal in this Court, which came up for hearing before my learned brother Din Mohammad J. sitting in Single Bench. Before him reliance was placed on behalf of the respondent on Regular Second Appeal No. 448 of 1940¹ decided by another Single Bench of this Court, in which S. 3 had been interpreted in the same way as had been done by the Senior Subordinate Judge in this case. As the learned Judge was doubtful of the correctness of that decision and the question involved was of general importance, he has referred the case to a Full Bench. The sole question for determination is whether the Senior Subordinate Judge has put a correct interpretation on S. 3 of the Act. That section, omitting the portions which

are not material for our present purposes, reads as follows :

"Notwithstanding anything contained in any other enactment for the time being in force, a suit by a money-lender for the recovery of a loan shall, after the commencement of this Act be dismissed, unless the money-lender —

(a) at the time of the institution of the suit . . . ; or

(b) at the time of decreeing the suit ; (i) is registered; and (ii) holds a valid license, in such form and manner as may be prescribed; or (iii) holds a certificate from a Commissioner granted under S. 11, specifying the loan in respect of which the suit is instituted, . . . ; or (iv) if he is not already a registered and licensed money-lender, satisfies the Court that he has applied to the Collector to be registered and licensed and that such application is pending : provided that in such a case the suit . . . shall not be finally disposed of until the application of the money-lender for registration and grant of license pending before the Collector is finally disposed of."

The plain meaning of this section is that a suit shall be dismissed unless the money-lender satisfies the conditions laid down in cls. (i) to (iv) either at the time of the institution of the suit or at any time before the passing of the decree. In Regular Second Appeal No. 448 of 1940¹ it was observed that cl. (a) relates to suits which are instituted after the commencement of the Act, and clause (b) to those which were pending at the time when the Act came into force. This interpretation is not borne out by the plain wording of S. 3 and is, if I may say so with respect, in conflict with S. 9 of the Act, to which the attention of the learned Judge does not appear to have been drawn. That section lays down in clear and explicit terms that "nothing in this Act shall apply to suit . . . pending (a) at the time of the commencement of this Act ; or (b) on the date of the cancellation of the license of the money-lender if before his current license is granted or renewed, a Court has not given any such findings as would render him liable to have his license cancelled under the provisions of S. 6 of this Act."

The Act thus applies only to suits instituted after the date on which it came into force. It specifically exempts from its operation suits pending on that date. In those cases, it is not necessary for the plaintiff to get himself registered or licensed ; they are to be decided as if the Act had not been passed. Obviously, cls. (a) and (b) of S. 3 both relate to suits which have been instituted after the commencement of the Act, and lay down that the plaintiff must be registered and must hold a license either at the institution of the suit, or if he is not so registered and licensed at that time he must get himself registered and licensed during the pendency of the suit. In cl. (iv), further provision is made that if the plaintiff has applied for registration and licensing either before the institution of the suit or during its pendency, but the application has not been disposed of by the Collector at the time when the suit is ripe for decision, the Court, if satisfied that such application is pending, shall postpone its decision until the Collector has finally disposed of the application. It is clear that the policy and the intention of the legislature was not to penalise a money-lender for omission to get himself registered or licensed before the institution of the suit, but to place facilities in his way to get himself so registered and licensed before the passing of the decree.

In Regular Second Appeal No. 448 of 1940,¹ it was also observed that if the contrary interpretation were

¹ R. S. A. No. 448 of 1940, Bakhshish Singh v. Sawan Singh.

accepted, cl. (a) would be entirely superfluous. It is, however, not explained how this result would follow. It seems obvious that in making separate provision for the two classes of cases described in (a) and (b), the legislature intended to make its meaning perfectly clear. With respect it must be held, that Regular S. A. No. 448 of 1940¹ was not correctly decided and must be overruled. The only additional argument urged before us by counsel is that cl. (iv) applies only to cases in which an application for registration and grant of licence has been made before the institution of the suit. This interpretation also is not warranted by the wording of the statute and is obviously wrong. Before concluding, it seems necessary to refer to an obiter dictum in the judgment of the Senior Subordinate Judge, to which he has referred by way of analogy, in support of his interpretation. The learned Judge has observed that if at the commencement of a suit the plaintiff is registered as a money-lender and holds a licence but during the pendency of the suit the licence is cancelled, his suit is liable to be dismissed. This observation is, clearly, erroneous and is opposed to cl. (b) of S. 9, which has been quoted in extenso above and which lays down that this result will not follow except in the particular case specifically mentioned in that clause. As in the present case the plaintiff had been registered as a money-lender and held a licence before the passing of the decree, he had satisfied the requirements of the law and his suit was not liable to dismissal under S. 8. For the foregoing reasons, I would accept this appeal, set aside the judgment and decree of the Senior Subordinate Judge and remand the case to him for decision of the remaining issue relating to the alleged repayment by the defendant of the amount due on the mortgage. Court-fee on this appeal shall be refunded; other costs shall be costs in the cause.

BHIDE J.—I agree.

DIN MOHAMMAD J.—I agree.

R.K. *Case remanded.*

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TEK CHAND AND DIN MOHAMMAD JJ.

Emperor

v.

Bakhshi Ram — Respondent.

Criminal Appeal No. 1483 of 1941, Decided on 28th August 1942, from order of Magistrate, First Class, Lahore, D/- 18th October 1941.

Arms Act (1878), Ss. 19 (f), 17 and 14 — Licence of gun in Form 16 under S. 17 — Licence holder must apply for renewal before expiry of licence — After expiry of licence possession of gun contravenes S. 14 and constitutes offence under S. 19 (f) — Note 2 to Form 16 merely provides period of grace and does not entitle quondam licence holder as of right to have licence renewed — Fact that District Magistrate renewed licences of others long after they had expired cannot affect legality of accused's possession of gun after expiry of licence though it may indicate that his failure to apply for renewal within time was not mala fide.

A person holding a licence for a gun under Form 16 prescribed under S. 17 must apply for renewal before the expiry of the licence. The possession of the gun after the expiry of the licence contravenes S. 14 and constitutes an offence under S. 19 (f).

Note 2 appended to the conditions printed on the licence Form 16 merely provides a period of grace during which the application for renewal may be made and the fees payable thereon deposited. It does not lay down that the quondam licence holder is entitled, as of right, to have the licence renewed on payment of the fee mentioned. The fact that the licences of several other persons had, as a matter of fact, been renewed by the District Magistrate long after the dates on which they had expired does not affect the legality of the accused's possession of the gun after the expiry of his licence, though it might indicate that his failure to apply for renewal within the prescribed time was not mala fide. [P 300h; P 301a,b]

[Case held called for only nominal sentence of fine. No order for confiscation of gun under S. 24 held should be passed.] [P 301b,c,d]

A. G. Maurice for Advocate-General — for the Crown.

L. Chaman — for Respondent.

TEK CHAND J. — The respondent, Bakhshi Ram, was tried by Mr. Sher Jang Singh, Magistrate first class, Lahore, under S. 19 (f), Arms Act. The learned Magistrate held the offence unproved and has acquitted him. From the order of acquittal, the Provincial Government has preferred an appeal under S. 417, Criminal P. C. The facts are no longer in dispute. The respondent had held a licence for a double-barrelled breech-loading gun for about 15 years, which he got duly renewed from time to time. The last renewal was on 15th January 1940 and was for a period of one year, commencing 1st January 1940. On the licence the date of expiry was expressly stated to be 31st December 1940. An application for renewal of the licence for the year 1941 was not made until 9th June 1941. A few days before, on 24th May 1941, the respondent had deposited the renewal fee for one year in the Imperial Bank of India. In the meantime, on 27th May 1941, however, the District Magistrate, Lahore, finding that the respondent had not got his licence renewed but was in continued possession of the gun, had written to the Senior Superintendent of Police to make enquiries if the licence had been renewed in another District and if not, to prosecute him. After enquiry a challan under S. 19 (f), Arms Act, was presented against him.

As stated above, the licence last issued to the respondent expired on 31st December 1940 and he did not make an application for its renewal until more than five months after that date. During this period, he was in possession of the gun without a licence. Section 14, Arms Act, lays down that "no person shall have in his possession, or under his control, any . . . fire arms . . ., except under a licence and in the manner and to the extent permitted thereby." Section 17 empowers the Governor-General-in-Council to "make, from time to time, by notification in the Gazette of India, rules to determine the officers by whom, the form in which, and the terms and conditions on and subject to which, any licence shall be granted," and by such rules, among other matters, to "fix the period for which such licence shall continue in force." Under these rules District Magistrates have been empowered to grant licences in various prescribed forms. The licence to the respondent for 1940 had been granted in Form 16, and in column 11 of this form the date of expiry had been entered as 31st December 1940. After the expiry of the licence the possession of the gun by the respondent was, therefore, in contravention of the provisions of S. 14, and, clearly, this is an offence punishable under S. 19 (f).

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LAHORE HIGH COURT

1942

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Puisne Judges :

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(FB) 260a

* — S. 33 — No Court has right to compel party to produce document against his wishes — Word "produced" in S. 33 — Meaning of — It is highly improper for Court to compel party to produce document with view to impound it because it was informed that it was insufficiently stamped — Such action must be deprecated 265b

— S. 33 — Nature of document can be determined only from its language and purpose which it was intended to serve — Object of document either to transfer or surrender mortgage rights — Document must be treated either as transfer of mortgage rights or as deed of release 265c

— S. 33 — Defendant filing receipts A and B — A not tendered in evidence — On 10th June 1938 Court writing on receipt A "Returned not proved" — On 30th August Court pronouncing judgment and orally directing receipt A to be impounded — Order through mistake written on receipt B and signed by Judge — Subsequently on mistake being brought to its notice, Court on 3rd April 1939 writing endorsement on receipt A that it was impounded — Collector holding receipt to be conveyance ordering defendant to pay deficiency and penalty — On revision Commissioner enhancing penalty — Matter coming before Financial Commissioner as

Stamp Act

Chief Controlling Revenue Authority under S. 56 (1) of Act — Financial Commissioner referring matter to High Court under S. 57 of Act — Impounding when takes place, explained — Receipt B held impounded and not receipt A — Court having become functus officio on 30th August 1938 held could not impound receipt A on 3rd April 1939 — Matter held could not be said to have come before revenue authorities in performance of their functions within S. 33 (Per *Special Bench*) (SB) 257a

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* — Ss. 35 and 2 (15) — Unstamped partition decree — There is no lack of inherent jurisdiction in executing Court in executing decree without objection — But there is illegality affecting its jurisdiction in acting upon decree in violation of S. 35 — Proper stamp supplied — Validity of decree dates back to date of decree — Execution petition instead of being struck off may proceed from that date — But it would not validate proceedings before stamp was supplied which would still be without jurisdiction

(FB) 260b

* — Ss. 35 and 36 — S. 35 is wider than S. 36 — Admitting into evidence and acting upon are distinct — Court in executing unstamped partition decree acts upon it within S. 35 — There is no question of admitting decree in evidence under S. 36 — Subsequent objection that decree could not be acted upon is not barred by S. 36 (FB) 260c

— Ss. 38 and 33 — Document illegally impounded by Court and sent to Collector — Collector cannot impound document of his own accord 265d

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Stamp Act

155 I. C. 1074 ; 40 P. L. R. 193=(38) 25 A. I. R. 1938 Lah. 508=177 I. C. 270 ; 40 P. L. R. 231 =(38) 25 A. I. R. 1938 Lah. 511=178 I. C. 197 and 41 P. L. R. 194=(39) 26 A. I. R. 1939 Lah. 486=188 I. C. 420, **OVERRULED** (FB) 50

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in connexion with mandir held property and alienable 284

—S. 6 (a)—Relinquishment of his spes successionis by heir-apparent is valid if it proceeds on settlement of conflicting claims or bona fide disputes—Mahomedan *M* dying leaving three sons—*G* claiming to be *M*'s legitimate son and suing for possession of his share—Under compromise *M*'s sons giving certain portion of property to *G* without admitting his claim—*G* agreeing not to press his claim as *M*'s son for share in *M*'s property nor in future claim as reversioner to *M*'s sons—On death of one of *M*'s sons *G* suing for share as reversioner of deceased son—*G* held estopped from claiming as reversioner—Compromise held not relinquishment of spes successionis but settlement of bona fide dispute between parties and hence was binding on *G* 138

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A. I. R. Lahore=Other Journals

AIR 1940 Lahore			AIR 1941 Lahore			AIR 1941 Lahore			AIR 1941 Lahore		
AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
416	44 P L R	192	279	198 I C	744	402	198 I C	726	453	198 I C	773
492	44 P L R	204		ILR 1942 L	386		ILR 1942 L	603	454	43 Cr L J	332
			284	ILR 1942 L	379	407	FBILR 1942 L	79	459	43 Cr L J	229
	A I R 1941 Lahore		310	ILR 1942 L	275	419	ILR 1942 L	212	460	43 Cr L J	254
	AIR Other Journals		314	198 I C	627	427	ILR 1942 L	788	464	198 I C	670
168	198 I C	643	316	ILR 1942 L	330	433	FBILR 1942 L	155	465	ILR 1942 L	129
246	ILR 1942 L	324	357	199 I C	653		1942-5 F L J H C 201	FB	43	Cr L J	235
248	ILR 1942 L	252	364	ILR 1942 L	199	444	FBILR 1942 L	190	471	43 Cr L J	268
256	199 I C	866	368	ILR 1942 L	619	447	198 I C	569	480	199 I C	773
273	ILR 1942 L	460	380	FBILR 1942 L	149	450	ILR 1942 L	483		ILR 1942 L	807
276	ILR 1942 L	402									

A. I. R. 1942 Lahore=Other Journals

AIR 1942 Lahore			AIR 1942 Lahore			AIR 1942 Lahore			AIR 1942 Lahore		
AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
1	43 P L R	737	70	conILR 1942 L	125	114	44 P L R	178	171	44 P L R	297
FB	ILR 1942 L	59	FB	199 I C	49	FB	200 I C	131	FB	201 I C	572
	198 I C	340		43 Cr L J	453		ILR 1942 L	364		ILR 1942 L	510
6	43 P L R	569	71	43 P L R	727	118	44 P L R	99		43 Cr L J	747
	198 I C	638		199 I C	160		200 I C	81	173	44 P L R	330
10	43 P L R	648	72	44 P L R	4	119	44 P L R	106	FB	202 I C	114
	197 I C	853		199 I C	254		200 I C	606		ILR 1942 L	717
	ILR 1942 L	742		43 Cr L J	542	121	44 P L R	96	179	44 P L R	286
11	199 I C	130	74	44 P L R	1		201 I C	200		201 I C	619
	44 P L R	463		199 I C	381	122	44 P L R	104	186	44 P L R	275
14	43 P L R	646		ILR 1942 L	300		200 I C	446		201 I C	739
	198 I C	28	76	44 P L R	7		43 Cr L J	632	190	44 P L R	249
	ILR 1942 L	464		199 I C	543	123	44 P L R	125		201 I C	462
16	43 P L R	651		43 Cr L J	572		200 I C	425	192	44 P L R	258
	198 I C	485	78	43 P L R	711	124	44 P L R	116		201 I C	647
19	44 P L R	21		199 I C	93		200 I C	438	194	44 P L R	353
FB	199 I C	395		43 Cr L J	467	125	44 P L R	101	FB	202 I C	45
	ILR 1942 L	217	80	199 I C	562		200 I C	514		ILR 1942 L	758
27	43 P L R	687		44 P L R	473		43 Cr L J	673	200	44 P L R	274
	198 I C	599	81	44 P L R	41	126	44 P L R	74		201 I C	511
28	43 P L R	667		199 I C	695		201 I C	87	201	44 P L R	253
	198 I C	273	84	44 P L R	71	129	44 P L R	31		201 I C	667
30	43 P L R	670		199 I C	532		201 I C	311	203	44 P L R	26
	198 I C	263		43 Cr L J	564	134	44 P L R	112		201 I C	631
31	43 P L R	665	85	ILR 1941 L	736		200 I C	629		ILR 1942 L	553
	198 I C	708	SB	199 I C	535		43 Cr L J	703		43 Cr L J	756
33	43 P L R	721		43 Cr L J	568	135	44 P L R	133	205	44 P L R	186
	198 I C	860		44 P L R	471		201 I C	159		201 I C	671
	43 Cr L J	439	86	44 P L R	54	136	44 P L R	114	207	ILR 1942 L	268
36	43 P L R	725		199 I C	720		200 I C	875		202 I C	133
	198 I C	894	87	44 P L R	80	138	44 P L R	87		44 P L R	460
	43 Cr L J	446		199 I C	700		201 I C	292	209	44 P L R	162
37	43 P L R	672	88	44 P L R	66	142	200 I C	684		202 I C	174
	198 I C	441		200 I C	159		44 P L R	476	211	44 P L R	347
	43 Cr L J	370	89	43 P L R	680	147	200 I C	801	FB	202 I C	140
40	43 P L R	729		199 I C	870	FB	ILR 1942 L	447		ILR 1942 L	746
	198 I C	832		43 Cr L J	588	151	44 P L R	109	214	44 P L R	300
	43 Cr L J	443		ILR 1942 L	470		201 I C	850		202 I C	15
42	43 P L R	689	92	44 P L R	69		44 P L R	157	215	44 P L R	791
	199 I C	677		199 I C	847	152	200 I C	697		202 I C	269
47	43 P L R	619	94	43 P L R	502		200 I C	302		202 I C	340
	199 I C	667		199 I C	851	153	44 P L R	802		43 Cr L J	828
50	44 P L R	10	95	44 P L R	140	FB	ILR 1942 L	559	217	202 I C	497
FB	199 I C	161	FB	200 I C	652		203 I C	166	FB	44 P L R	488
	ILR 1942 L	282		ILR 1942 L	491	162(1)	44 P L R	203	223	44 P L R	420
59	43 P L R	712	100	44 P L R	38		201 I C	137	FB	202 I C	437
	198 I C	796		200 I C	106	162(2)	44 P L R	186	232	44 P L R	409
	43 Cr L J	428		43 Cr L J	619		201 I C	240		202 I C	292
64	43 P L R	710	102	44 P L R	126	164(1)	44 P L R	224		43 Cr L J	808
	199 I C	298	FB	200 I C	302		201 I C	118	234	44 P L R	342
65	43 P L R	732		ILR 1942 L	349	164(2)	44 P L R	150		202 I C	347
	199 I C	604	105	44 P L R	206		201 I C	675	237	44 P L R	376
68	44 P L R	15	FB	200 I C	182	169	44 P L R	318		202 I C	689
	199 I C	387		43 Cr L J	599	FB	201 I C	468	240	44 P L R	324
70	FB 44 P L R	29		ILR 1942 L	411		ILR 1942 L	592		202 I C	421

AIR 1942 Lahore			AIR 1942 Lahore			AIR 1942 Lahore			AIR 1942 Lahore		
AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
248	44 P L R	382	256	44 P L R	401	275	44 P L R	415	296	ILR 1942 L	241
	203 I C	404		202 I C	609	FB	203 I C	462	FB	203 I C	501
252	44 P L R	428		43 Cr L J	865	279	ILR 1942 L	548		44 Cr L J	14
	202 I C	449	257SB	202 I C	670		45 P L R	43	298	44 P L R	529
253	44 P L R	429	260	ILR 1942 L	307		203 I C	273	FB	203 I C	564
	202 I C	452	FB	203 I C	34	280	44 P L R	368	300	44 P L R	486
	43 Cr L J	849	265	44 P L R	188		203 I C	295		203 I C	542
254	44 P L R	399		203 I C	7	284	44 P L R	403	301	44 P L R	457
	202 I C	433	267	44 P L R	288		203 I C	348		203 I C	605
255	ILR 1942 L	145		203 I C	395	287	44 P L R	540	302	44 P L R	468
	202 I C	315	271	44 P L R	448		203 I C	363		203 I C	496
	43 Cr L J	812		203 I C	488	289	ILR 1942 L	517	304	203 I C	595
				44 Cr L J	77	FB	204 I C	74		45 P L R	42

OTHER JOURNALS=ALL INDIA REPORTER

ILR 1942 Lah.			44 Pun L R			44 Pun L R			43 Cr L J			43 Cr L J						
ILR	AIR	PLR	AIR	PLR	AIR	CrLJ	AIR	CrLJ	AIR	CrLJ	AIR	CrLJ	AIR					
1	1941 PC	120	1	1942 L	74	249	1942 L	190	7	1942 P	107	110	1941 P	548				
36	"	132	4	"	72	253	"	201	8	1941 L	361	112	"	S 208				
50	"	L 268	7	"	76	258	"	192	11	1942 M	289	113	"	L 425				
59	1942	"	1	10	"	50	261	"	FC	17	12	1941 S	173	115	1942 O	60		
74	1941	"	399	15	"	68	269	"	L	215	16	"	C	271	122	1941 S	207	
79	"	"	407	18	1941 PC	93	274	"	"	200	17	"	B	278	123	"	R 301	
125	1942	"	70	21	1942 L	19	275	"	"	186	24	"	N	316	126	"	M 766	
129	1941	"	465	26	"	203	284	"	FC	14	25	"	B	334	127	"	L 422	
145	1942	"	255	29	"	70	288	"	L	267	27	1942 P	46	129	"	N 324		
149	1941	"	380	31	"	129	297	"	"	171	28	1941 C	560	133	1942 M	81		
155	"	"	433	38	"	100	300	"	"	214	30	"	R	247	134	"	P 143	
190	"	"	444	41	"	81	302	"	"	153	33	"	C	550	135	"	O 112	
199	"	"	364	45	1941 PC	132	318	"	"	169	36	1942 P	90	136	1941 M	939		
212	"	"	419	48	1942 FC	1	324	"	"	240	40	1941 M	488	137	"	O 472		
217	1942	"	19	51	1941 PC	123	330	"	"	173	41	1942 P	96	138	1942 M	75		
241	"	"	296	54	1942 L	86	342	"	"	234	43	1941 M	808	139	"	O 163		
252	1941	"	248	56	1941	"	340	347	"	"	211	44	1942 P	58	145	1941 L	372	
268	1942	"	207	59	"	"	465	353	"	"	194	47	1941 C	608	153	1942 O	89	
275	1941	"	310	66	1942	"	88	368	"	"	230	48	1942 P	77	156	1941 M	884	
282	1942	"	50	69	"	"	92	376	"	"	237	49	1941 M	845	157	"	R 209	
307	"	"	260	71	"	"	84	382	"	"	243	50	1942 O	50	160	1942 P	130	
324	1941	"	246	74	"	"	126	399	"	"	254	54	1941 N	302	161	"	M 25	
330	"	"	316	80	"	"	87	401	"	"	256	56	"	M	894	162	"	O 104
349	1942	"	102	83	1941 PC	90	403	"	"	284	57	"	R	295	163	"	M 38	
364	"	"	114	87	1942 L	138	409	"	"	232	58	"	M	679	164	"	O 128	
379	1941	"	284	96	"	"	121	415	"	"	275	59	"	L	368	165	1941 L	322
386	"	"	279	99	"	"	118	420	"	"	228	60	1942 O	57	167	"	B 408	
402	"	"	276	101	"	"	125	428	"	"	252	61	1941 L	360	169	"	Pesh 102	
411	1942	"	105	104	"	"	122	429	"	"	253	62	"	N	296	170	"	L 414
447	"	"	147	106	"	"	119	432	"	PC	35	63	"	L	384	172	1942 P	289
460	1941	"	273	109	"	"	151	435	"	"	42	64	"	C	479	173	1941 A	336
464	1942	"	14	112	"	"	134	437	"	FC	27	65	1942 P	53	174	"	B 410	
470	"	"	89	114	"	"	136	448	"	L	271	68	1941 S	186	177	"	A 402	
483	1941	"	450	116	"	"	124	455	1943	"	27	71	"	L	367	205	1942 P	446
491	1942	"	95	120	"	PC	1	457	1942	"	301	72	"	M	834	210	1941 B	367
510	"	"	171	123	1941 L	25	460	"	"	207	73	"	S	193	212	1942 M	83	
517	"	"	289	125	1942	"	123	463	"	"	11	76	"	L	340	213	1941 B	412
548	"	"	279	126	"	"	102	468	"	"	302	78	"	M	749	215	"	M 910
553	"	"	203	133	"	"	135	471	"	"	85	79	"	N	321	217	"	R 333
559	"	"	153	136	"	"	205	473	"	"	80	80	"	M	838	218	"	M 825
592	"	"	169	140	"	"	95	476	"	"	142	81	"	"	814	219	"	B 355
603	1941	"	402	150	"	"	164	486	"	"	300	82	"	S	160	220	1942 P	351
619	"	"	368	157	"	"	152	488	"	"	217	83	"	M	889	227	"	M 92
623	1942 FC	27	162	"	PC	3	510	1943	"	26	89	"	N	338	228	1941 R	352	
643	"	"	38	172	"	L	209	511	"	"	14	90	1942 P	113	229	"	L 459	
675	1943 L	81	178	"	FC	3	518	"	"	22	96	1941 Pesh	79	230	1942 P	190		
686	1942 PC	67	186	"	"	L	114	524	"	"	1	97	"	A	359	233	1941 M	905
692	"	FC	3	188	"	"	265	533	1943	"	10	100	"	N	241	234	1942 P	145
712	"	"	1	192	1940	"	416	540	1942	"	287	101	"	P	546	240	"	B 414
717	"	L	173	200	1941 PC	180	545	1943	"	"	5	103	1942 M	77	241	"	S 204	
742	"	"	10	208	1942 L	162	549	"	"	23	104	1941 L	371	243	1942 O	193		
746	"	"	211	204	1940	"	492	554	"	"	56	105	"	S	190	250	1941 M	941
758	"	"	194	206	1942	"	105	"	43 Cr L J	"	106	"	M	783	252	1942 O	214	
788	1941	"	427	224	"	"	184	CrLJ	AIR	"	107	"	C	491	254	1941 L	460	
800	1942	"	74	225	1941 PC	190	1	1941 PC	132	108	"	T	491	255	"	R	332	

Other Journals = All India Reporter (contd.)

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43 Cr L J			43 Cr L J			43 Cr L J			43 Cr L J			43 Cr L J		
CrLJ	A I R		CrLJ	A I R		CrLJ	A I R		CrLJ	A I R		CrLJ	A I R	
262	1941	B 336	412	1942	C 435	565	1942	C 239	731	1942	O 407	879	1942	A 334
263	"	R 342	413	"	P 291	568	"	L 85	733	"	S 95	883	"	P 420
265	"	S 177	416	"	O 221	569	"	R 64	734	"	M 173	886	1943	C 73
266	"	R 319	422	"	B 79	570	"	P 183	738	"	" 326	887	"	" 121
268	"	L 471	423	"	P 468	572	"	L 76	739	"	O 438	888	1942	S 106
277	1942	C 36	425	1941	M 853	574	"	M 513	741	"	M 534	896	1943	C 88
278	"	M 221	426	"	R 340	576	"	" 285	742	"	P 319	897	"	L 1
279	"	P 281	428	1942	L 59	578	"	O 318	743	"	M 465	900	"	C 31
280	"	O 180	433	1941	M 498	582	"	M 288	745	"	" 420	901	"	L 8
286	1941	P 606	436	1942	O 147	583	"	B 86	747	"	L 171	903	"	P 32
287	"	R 349	439	"	L 33	588	"	L 89	750	"	M 444	904	"	L 26
289	"	" 348	441	"	M 19	593	"	C 288	751	"	" 404	905	"	S 46
290	"	S 214	443	"	L 40	594	"	M 437	753	"	" 295	911	1942	P 439
292	"	R 347	445	1941	M 761	595	"	Pesh 21	754	"	B 215	912	"	O 462
293	"	S 216	446	1942	L 36	596	1941	M 870	755	"	M 532	915	"	P 444
294	"	P 613	448	1941	R 337	599	1942	L 105	756	"	L 203	917	1943	N 22
296	1942	" 271	450	1942	A 90	611	"	Pesh 24	757	"	M 552	918	"	P 109
300	"	M 81	451	1941	C 713	612	"	S 62	758	"	" 530	921	1942	A 328
301	"	P 283	453	1942	L 70	615	"	P 156	759	"	B 206	923	1943	P 3
304	"	S 9	454	"	M 178	618	"	M 439	760	"	M 594	924	1942	M 674
306	"	B 26	455	"	C 426	619	"	L 100	761	"	B 214	925	1943	L 27
308	"	S 11	457	"	M 281	621	"	B 121	762	"	M 530	926	"	C 41
311	"	FC 1	458	"	S 33	625	"	P 401	763	"	O 443	927	"	S 55
313	"	B 28	463	"	M 237	631	"	N 74	764	"	M 347			
314	"	M 113	466	"	C 225	632	"	L 122	765	"	B 205		197 I C	
315	"	B 18	467	"	L 78	633	"	P 337	766	"	Pesh 51	IC	A I R	
318	"	M 347	468	1941	S 221	634	"	O 368	768	"	M 356	1	1941	L 392
319	"	A 11	472	1942	A 102	636	"	C 307	769	"	B 206	5	"	C 520
320	"	M 100	473	"	S 52	637	"	P 331	770	"	M 452	12	1942	O 139
321	"	B 39	475	"	B 78	641	"	O 425	771	"	S 85	13	"	P 195
323	"	N 38	476	"	S 51	642	"	B 190	772	"	M 532	15	1941	C 441
325	"	M 93	477	"	M 221	643	"	O 434	773	"	B 212	16	"	M 766
326	1941	C 715	479	"	P 159	645	"	B 184	776	"	O 441	17	"	N 287
327	1942	M 290	481	"	FC 17	646	"	O 423	778	"	B 216	19	"	A 359
328	"	B 37	486	"	A 140	647	"	S 92		"	B 216	20	"	R 234
331	"	M 293	487	"	M 249	648	"	P 304	779	"	S 80	22	"	C 534
332	1941	L 454	489	"	O 310	649	"	N 80	780	"	B 220	23	"	B 184
336	1942	M 241	490	"	A 143	651	"	C 351	781	"	O 444	25	"	R 231
337	"	P 185	491	"	C 428	654	"	A 225	785	"	M 233	30	"	B 203
338	"	A 74	492	"	R 48	657	"	O 321	786	"	B 205	31	"	M 677
340	"	M 69	493	"	P 190	660	"	M 287	787	1943	P 64	33	"	N 300
341	"	B 32	498	"	Pesh 29	661	"	O 435	788	1942	S 86	35	"	A 284
342	"	O 246	503	"	O 342	665	"	M 531	790	"	A 253	36	"	N 282
344	1941	M 751	504	"	FC 22	666	"	O 448	791	"	L 214	42	"	R 274
345	1942	S 5	511	"	P 376	667	"	B 154	793	"	C 464	43	"	N 304
346	"	M 49	513	"	C 142	668	"	O 439	795	"	P 480	45	"	C 506
353	"	P 250	514	"	S 45	670	"	M 426	797	"	C 495	48	"	PC 99
355	"	" 439	516	"	M 213	671	"	" 415	798	"	M 553	50	"	C 233
357	"	N 45	518	"	O 256	673	"	L 125	799	"	S 102	54	"	M 765
359	"	M 276	521	"	M 227	674a	"	M 501	803	"	Pesh 61	56	"	N 241
360	"	B 27	523	"	O 244	674b	"	A 156	804	"	S 89	58	"	L 248
361	"	M 31	524	"	M 196	692	"	S 77	807	"	M 417	63	"	P 546
362	"	B 42	525	"	R 49	693	"	C 277	808	"	L 232	65	"	L 369
365	"	O 186	527	"	A 121	698	"	N 82	810	"	M 450	66	"	Pesh 78
368	"	M 281	528	"	S 50	700	"	S 78	812	"	L 255	67	"	L 431
369	"	B 25	529	"	B 71	701	"	B 150	813	"	M 446	68	"	C 491
370	"	L 37	536	"	M 319	702	"	M 452	817	"	P 481	69	"	S 208
372	"	M 20	537	"	P 150	703	"	L 134	826	"	B 258	70	"	C 559
373	1941	R 324	538	"	M 199	704	"	M 427	828	"	L 215	71	"	M 763
380	1942	A 47	539	"	C 219	705	"	S 75	830	"	O 473	72	"	B 186
383	"	M 251	542	"	L 72	707	"	" 100	837	"	Pesh 50	74	"	P 548
384	"	Pesh 11	543	1943	M 275	708	"	B 148	838	"	S 65	76	"	N 273
386	"	S 1	544	1942	P 427	710	"	M 357	849	"	L 253	80	1942	P 302
389	1941	C 707	547	"	M 269	714	"	S 91	851	"	M 354	81	1941	M 720
395	1942	M 182	548	"	C 214	715	"	M 440	854	"	A 349	85	1942	O 106
396	"	C 66	549	"	P 321	716	"	A 386	856	"	N 117	87	"	P 107
397	"	M 181	551	"	S 32	717	"	N 96	858	"	A 337	88	1941	B 178
398	"	O 356	553	"	C 237	719	"	O 399	859	"	M 603	94	1942	O 84
400	"	B 23	555	"	R 60	720	"	S 98	860	"	C 524	98	1941	S 173
401	"	M 240	556	"	C 426	721	"	O 394	863	"	M 609	98	1942	M 289
402	"	C 79	557	"	M 223	722	"	P 414	865	"	" 256	102	1942	M 289
406	"	O 270	559	"	B 94	726	"	B 152	866	"	M 601	103	1941	L 899
409	"	M 242	561	"	C 440	728	"	Pesh 47	867	"	A 339	104	"	Pesh 81
410	"	C 434	562	"	B 84	729	"	O 416	870	"	C 529	108	"	L 311
411	"	M 279	564	"	L 84	730	"	B 154	876	"	S 117	111	"	R 297

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IC	A	I	R	IC	A	I	R	IC	A	I	R	IC	A	I	R	IC	A	I	R	
113	1941	C	271	327	1941	N	245	579	1942	M	33	784	1941	M	860	95	1942	S	9	
114	"	"	A	355	331	"	C	553	580	1941	R	333	786	"	R	319	97	"	P	169
116	"	"	L	425	333	"	M	584	581	"	L	400	788	"	B	382	98	"	O	202
118	"	PC	106	334	"	C	613	582	"	A	357	790	"	M	799	99	1941	R	268	
121	1942	O	60	339	"	L	372	583	"	M	825	791	1942	O	122	100	"	L	274	
128	1941	C	509	347	"	S	193	584	"	L	356	794	1941	N	334	102	"	B	372	
131	"	R	301	350	"	R	209	585	"	B	412	797	"	R	342	104	1942	M	281	
134	"	M	939	353	"	L	364	587	"	A	366	799	1942	M	221	105	1941	C	716	
135	"	S	207	359	1942	P	130	588	"	M	910	800	1941	A	371	106	1942	B	22	
136	"	L	422	360	1941	C	536	590	"	S	154	801	"	L	471	107	"	O	120	
138	"	N	324	361	1942	P	152	594	"	B	355	810	"	A	400	109	"	M	20	
142	"	B	193	365	1941	C	625	595	"	R	225	812	"	O	299	110	"	S	11	
146	1942	M	81	376	"	"	541	598	"	B	414	814	"	A	431	113	"	O	110	
147	1941	C	223	384	"	PC	134	599	"	M	903	815	1942	C	36	114	"	B	26	
157	"	B	204	390	"	A	377	602	"	N	317	817	"	"	37	116	"	P	269	
158	1942	O	145	398	"	C	481	606	"	C	639	818	"	P	188	117	1941	M	929	
160	"	P	266	399	"	PC	128	609	"	L	307	821	1941	C	699	120	1942	B	28	
161	1941	B	369	401	1942	O	104	612	"	N	357	824	"	P	624	122	1941	P	617	
164	1942	O	172	402	1941	M	634	618	1942	P	351	825	"	B	378	125	"	L	234	
166	1941	C	329	404	1942	O	128	626	1941	L	421	827	1942	P	281	130	1942	N	18	
167	1942	O	1	406	1941	R	314	627	1942	P	128	829	1941	A	392	131	"	M	113	
175	"	P	262	407	1942	O	177	630	"	M	92	832	"	P	606	132	1941	L	268	
178	"	O	217	409	1941	B	415	631	1941	P	638	833	"	B	361	134	"	B	344	
180	1941	C	265	411	1942	O	197	633	"	Pesh	89	837	"	P	616	136	1942	C	49	
181	1942	P	286	413	1941	L	322	647	1942	P	199	839	1942	O	130	139	"	R	1	
183	1941	Pesh	85	415	"	N	216	650	1941	L	459	845	1941	R	349	148	"	A	11	
185	1942	P	309	416	"	B	408	651	1942	P	146	847	"	A	358	149	1941	R	229	
186	1941	PC	114	419	"	M	680	654	1941	R	352	848	"	R	348	150	1942	O	206	
192	1942	P	161	420	"	Pesh	102	655	1942	P	133	849	"	S	214	152	1941	C	702	
199	1941	M	772	421	"	M	826	658	1941	M	905	851	"	A	397	155	1942	N	5	
213	1942	P	143	422	"	B	395	659	1942	P	138	853	"	C	673	158	1941	M	898	
214	"	M	25	425	"	M	747	660	1941	C	609	856	1942	Pesh	1	163	1942	B	18	
215	"	P	148	426	"	N	207	664	1942	P	145	858	"	L	10	166	"	PC	3	
216	1941	R	238	428	"	B	385	665	"	O	151	860	1941	A	360	169	"	M	106	
217	1942	P	335	432	"	M	863	669	1941	L	465	862	"	L	450	174	1941	S	196	
220	1941	R	269	433	1942	P	234	674	1942	P	181	864	"	O	466	176	"	C	718	
221	"	N	308	437	1941	C	579	677	"	O	208	866	"	A	385	177	"	M	925	
224	"	M	709	440	1942	P	197	678	1941	B	397	868	"	S	216	180	"	R	339	
225	1942	O	112	441	1941	M	794	686	1942	O	201	869	"	C	643	181	1942	C	47	
227	1941	L	433	443	1942	P	136	688	1941	P	612	883	1942	M	251	182	"	M	347	
238	"	M	795	445	1941	C	662	689	1942	O	31	884	"	S	14	183	"	Pesh	7	
239	"	O	472	446	"	L	414	692	1941	S	204	886	1941	R	347	184	"	O	180	
241	1942	P	210	448	"	M	815	694	"	P	611	887	"	B	357	188	1941	B	346	
245	1941	M	678	449	1942	P	201	696	"	A	387	890	"	R	270	192	"	O	445	
247	1942	O	155	462	1941	R	305	701	1942	O	193	893	"	S	209	195	1942	M	290	
252	1941	C	661	467	1942	O	205	708	1942	P	112	895	"	B	365	196	1941	C	715	
253	"	B	337	470	"	P	242	710	"	O	214		198 I C			197	1942	M	41	
255	1942	O	89	471	"	O	189	711	1941	L	460	IC	A I R			199	1941	L	416	
259	1941	M	805	476	"	P	243	715	1942	O	113	1	1942	FC	1	204	"	P	237	
260	"	R	733	478	"	O	108	717	1941	M	941	3	"	P	166	206	"	B	17	
261	"	M	731	480	"	P	285	717	1941	C	666	12	"	FC	3	207	"	M	293	
263	"	L	444	481	1941	L	347	720	"	O	125	13	"	Pesh	5	208	"	P	213	
265	1942	M	75	488	"	M	816	723	1942	O	135	18	"	A	12	225	"	M	100	
267	1941	PC	68	489	"	C	659	726	1941	P	594	16a	1941	M	751	226	"	B	39	
273	"	Pesh	87	491	1942	P	239	728	"	L	419	16b	1942	"	69	228	"	N	38	
275	"	N	180	492	1941	A	353	730	"	P	596	17	1941	L	427	230	1941	M	933	
276	"	A	399	495	"	C	449	733	"	B	336	21	"	O	566	232	"	B	406	
277	1942	O	163	497	"	A	336	734	"	R	332	22	"	B	356	234	1942	O	203	
282	1941	L	407	498	1942	P	247	735	"	L	337	23	"	C	676	236	1941	M	937	
289	"	A	367	502	1941	B	410	738	1942	M	103	26	1942	M	81	238	1942	B	29	
291	"	S	178	504	1942	P	446	739	"	P	185	27	1941	B	381	241	"	O	117	
299	"	M	750	509	1941	A	372	741	1941	R	299	28	1942	L	14	243	1941	R	259	
300	"	N	292	513	"	R	250	743	1942	O	135	30	1941	B	374	245	1942	B	37	
302	"	M	751	520	"	N	223	746	1941	N	330	34	"	N	278	248	1941	M	985	
303	1942	P	275	521	"	Pesh	103	750	1942	P	176	37	"	R	265	250	1942	P	196	
304	1941	M	334	523	"	S	202	756	1941	C	632	40	1942	O	209	252	1941	L	454	
305	1942	O	133	525	"	A	402	760	1942	O	109	42	1941	R	276	256	1942	P	185	
308	1941	B	312	554	1942	O	179	761	1941	M	857	59	"	C	691	257	"	A	71	
313	1942	O	174	555	1941	PC	139	763	"	C	562	68	"	P	613	258	"	M	241	
316	1941	C	512	560	1942	O	143	774	"	S	217	69	1942	S	4	259	"	B	32	
319	"	L	397	564	1941	L	316	777	"	R	298	71	1941	C	681	260	1941	M	922	
321	"	O	535	570	"	N	364	778	"	N	313	73	1942	P	271	262	1942	N	3	
324	"	M	845	574	"	L	343	781	"	S	177	82	"	A	1	263	"	L	30	
326	"	C	657	577	"	B	367	782	1942	Pesh	4	92	"	P	283	264	"	A	74	

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IC	AIR			IC	AIR			IC	AIR			IC	AIR			IC	AIR		
267	1941	L	380	488	1942	B	12	673	1942	R	10	17	1942	A	103	225	1941	M	449
271	1942	P	42	490	"	Pesh	11	674	"	C	55	18	"	P	392	251	1942	P	119
273	"	L	28	493	"	S	1	678	"	R	11	20	1941	M	414	252	"	A	147
275	"	A	45	496	"	A	42	680	1941	P	625	22	1942	P	50	254	"	L	72
276	"	O	246	499	1941	C	707	690	1942	A	19	23	1941	M	480	256	"	P	282
279	"	C	53	505	1942	B	34	706	1941	O	512	24	1942	P	304	257	"	R	17
281	"	S	5	506	1941	M	811	708	1942	L	31	27	1941	R	337	269	"	C	219
282	1941	P	609	509	1942	O	115	710	"	B	79	30	1942	P	315	272	"	M	266
284	"	N	322	512	1941	M	600	711	"	P	449	32	1941	C	670	274	"	R	30
285	1942	B	53	514	1942	O	281	714	"	O	221	35	1942	O	231	290	"	M	12
297	1941	A	369	515	"	M	240	720	"	S	27	44	"	C	378	291	"	S	41
288	1942	B	15	516	1941	R	244	724	"	P	468	46	"	Pesh14	297	"	C	244	
290	"	Pesh	8	519	"	M	549	726	1941	L	402	47	1941	C	713	298	"	L	64
291	"	B	33	521	1942	P	204	732	"	M	660	49	1942	L	70	299	"	B	64
292	1941	M	605	528	"	M	242	734	1942	Pesh	13	50	"	M	281	302	"	A	90
293	1942	N	30	529	"	P	33	735	1941	C	706	51	"	N	50	307	"	P	427
295	"	M	49	531	1941	M	616	737	"	R	239	53	"	C	65	310	"	M	275
303	1941	C	689	532	1942	A	77	739	1942	C	69	54	"	M	178	311	"	C	214
304	1942	A	73	535	"	P	251	743	"	P	76	55	"	C	426	312	"	P	293
305	1941	M	569	543	"	M	182	744	1941	L	279	57	"	A	50	314	"	PC	11
307	1942	P	250	544	"	B	61	749	1942	N	26	78	"	S	33	316	"	M	269
309	1941	M	666	547	"	O	356	753	"	PC	6	88	"	P	84	317	"	P	321
311	1942	P	295	549	"	M	181	756	"	C	39	85	"	B	78	320	"	M	249
313	"	N	12	550	"	B	44	757	"	O	252	86	"	P	443	321	"	O	310
315	1941	C	484	552	1941	M	635	760	1941	M	235	87	"	M	237	322	"	FC	17
322	"	M	639	553	1942	O	258	764	1942	N	4	91	"	P	379	327	"	N	32
324	1942	C	51	557	"	B	59	765	1941	M	853	93	"	L	78	329	"	Pesh18	
326	1941	L	166	559	"	C	66	766	"	R	340	94	"	C	225	331	"	FC	14
327	1942	O	243	560	1941	M	502	768	1942	C	87	95	"	P	360	334	"	PC	13
328	1941	M	563	561	1942	B	23	773	1941	L	453	99	"	M	252	341	"	P	323
330	"	R	212	562	1941	M	580	775	1942	O	199	101	1941	S	221	344	"	O	290
338	"	M	538	564	"	R	344	777	1941	R	334	105	1942	M	260	346	"	A	85
340	1942	L	1	567	1942	S	17	785	1942	"	13	110	"	R	52	351	"	B	84
345	1941	N	311	569	1941	L	447	787	1941	M	620	116	"	O	248	353	"	Pesh22	
347	1942	P	287	573	"	M	632	788	1942	C	72	119	"	S	52	354	1941	N	159
348	1941	C	635	575	1942	B	57	791	"	R	15	122	"	A	119	356	"	M	913
353	1942	P	1	578	1941	M	622	793	1941	M	498	124	"	O	331	362	1942	C	237
385	"	A	36	581	1942	N	19	796	1942	L	59	126	"	S	51	364	"	O	361
388	"	O	141	588	"	M	183	801	1941	M	410	127	"	A	102	366	1941	M	412
390	"	P	375	597	1941	"	626	803	1942	Pesh	9	128	"	M	221	367	1942	S	32
392	"	Pesh	6	599	1942	L	27	805	1941	M	572	130	"	L	11	368	"	M	199
393	1941	N	297	600	1941	M	567	807	1942	N	1	133	"	M	227	369	"	A	110
396	1942	M	276	602	1942	C	79	809	"	M	19	135	"	O	256	378	"	R	60
397	"	A	39	606	1941	M	602	810	"	C	120	137	"	S	50	379	"	N	57
400	"	P	439	609	1942	B	54	811	1941	M	385	139	"	M	213	381	"	L	74
402	1941	N	353	611	1941	M	892	814	"	S	191	141	"	C	66	383	"	O	289
404	"	R	316	612	1942	O	270	816	"	M	406	143	"	M	196	384	"	C	426
408	1942	B	35	616	1941	M	607	818	1942	P	52	144	"	P	372	385	"	O	279
409	"	N	45	617	1942	C	434	819	"	O	147	147	"	R	49	387	"	L	68
411	"	P	244	618	"	Pesh	16	821	"	P	264	149	"	M	267	389	"	B	80
414	1941	R	322	620	1941	C	679	824	"	N	8	150	"	C	143	390	"	O	97
417	"	M	606	621	1942	R	12	823	"	O	239	151	1941	N	355	393	1941	M	924
418	"	S	211	622	1941	B	350	830	"	A	79	156	1942	O	244	394	"	C	254
422	"	M	558	627	"	L	314	832	"	L	40	157	"	P	279	395	1942	L	19
424	1942	B	27	629	1942	C	435	834	"	P	259	160	"	L	71	403	1941	C	333
425	1941	M	628	630	"	S	19	837	"	C	26	161	"	"	50	406	1942	M	223
426	1942	B	42	632	1941	C	602	843	1941	M	704	169	1941	P	566	408	"	P	99
428	"	M	31	633	1942	A	14	845	1942	O	254	175	1942	M	191	412	1941	C	298
430	"	B	50	638	"	L	6	847	"	S	7	177	"	P	310	417	1942	B	94
433	"	O	186	642	"	C	45	849	"	B	1	179	"	C	142	418	"	C	83
437	"	B	25	643	1941	L	168	860	"	L	33	180	"	O	245	421	"	P	325
438	1941	M	618	644	1942	C	85	863	"	A	82	181	"	A	121	424	1941	M	672
439	1942	B	21	646	"	B	46	866	"	P	60	182	"	P	296	425	1942	C	448
441	"	L	37	649	"	M	279	870	1941	M	582	190	"	A	122	427	1941	N	249
443	"	O	216	650	"	C	68	873	"	N	36	196	"	P	270	430	"	C	269
446	1941	L	109	651	"	O	273	890	1942	P	366	198	"	S	45	432	"	M	706
449	"	N	328	653	1941	N	343	893	1941	M	761	200	"	P	159	433	"	C	142
452	1942	A	47	656	1942	P	35	894	1942	L	86	202	"	B	71	434	1942	B	81
455	1941	R	324	658	"	O	283	896	"	A	90	209	"	Pesh17	435	"	C	428	
462	"	C	574	662	"	P	291		199 IC			211	"	M	268	436	1941	M	611
467	1942	O	169	665	"	N	36	IC	AIR			212	"	A	104	437	"	C	304
471	1941	C	663	667	1941	P	603	1	1942	FC	8	218	"	P	150	438	1942	S	37
474	"	B	339	670	"	L	464	10	"	C	438	220	"	O	76	442	"	C	440
479	1942	O	226	671	1942	M	319	12	"	O	306	222	"	P	258	443	1941	M	401
485	"	L	16	672	"	P	328	15	1941	M	405	224	"	A	134	445	"	C	332

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199 I C			199 I C			199 I C			200 I C			200 I C		
IC	A I R		IC	A I R		IC	A I R		IC	A I R		IC	A I R	
446	1942	O 250	667	1942	L 47	851	1942	L 94	159	1942	L 88	362	1942	C 215
448	1941	M 891	670	"	P 312	853	"	A 129	160	"	B 82	866	1941	M 577
449	"	" 697	672	"	A 139	854	1941	M 487	163	1941	M 886	868	1942	N 74
450	"	C 361	673	"	O 322	856	1942	B 86	164	1942	O 332	369	1941	M 669
453	"	N 268	676	"	P 181	861	"	S 53	166	"	N 39	871	1942	B 125
456	1942	O 308	677	"	L 42	866	1941	L 256	171	"	M 437	375	1941	M 699
458	"	A 96	681	1941	C 363	867	"	M 890	172	"	O 335	380	1942	P 401
464	1941	C 266	682	1942	O 301	868	1942	P 381	176	"	C 325	386	"	C 151
465	1942	P 344	684	"	P 140	870	"	L 89	182	"	L 105	388	1941	M 497
466	1941	M 480	688	"	M 513	874	"	N 64	194	"	N 84	389	1942	P 349
469	1942	A 128	689	1941	C 289	876	1941	P 349	196	"	Pesh27	392	"	C 180
470	"	P 343	692	1942	B 100	878	1942	Pesh 29	198	"	FC 27	425	"	L 123
472	1941	M 877	693	1941	M 428	882	1941	M 513	205	1941	M 446	426	"	O 422
473	1942	R 48	695	1942	L 81	893	"	C 255	208	1942	P 156	427	"	A 184
474	1941	M 615	698	"	O 311	895	"	M 399	211	"	S 62	429	"	Pesh33
475	1942	P 190	700	"	L 87				215	"	P 394	433	1941	M 865
480	1941	M 588	702	"	N 47				216	"	C 92	434	1942	A 150
481	1942	B 67	704	1941	M 479				223	"	O 385	438	"	L 124
486	"	C 99	705	1942	Pesh 25	1	1942	PC 21	225	"	A 170	440	"	B 134
507	"	A 148	707	"	S 57	10	1941	M 398	232	"	M 439	443	1941	M 847
509	"	O 309	710	1941	M 475	12	1942	B 131	233	"	O 350	446	1942	L 122
510	"	A 140	712	1942	O 316	13	1941	M 719	235	"	C 133	448	"	O 381
511	"	P 340	713	"	P 226	14	1942	N 78	238	"	O 338	453	"	C 145
518	"	B 90	718	"	B 98	16	"	C 307	239	1941	M 866	456	"	B 132
519	1941	C 291	720	"	L 86	17	1941	M 654	240	1942	N 72	459	1941	M 878
525	1942	S 47	722	1941	C 399	20	1942	N 52	241	"	O 354	465	1942	O 358
528	1941	M 493	723	1942	B 95	27	1941	M 440	245	1941	M 557	469	"	C 245
531	1942	Pesh 19	725	"	P 341	32	1942	B 101	246	1942	C 297	477	1941	M 827
532	"	L 84	728	1941	C 305	34	1941	M 745	249	1941	M 767	479	1942	O 349
534	1941	M 383	731	1942	N 59	35	1942	N 60	254	"	" 688	480	"	C 167
535	1942	L 85	733	1941	C 368	36	1941	M 564	256	1942	O 334	483	1941	M 838
537	1941	N 346	736	1942	P 357	37	"	C 416	257	1941	M 831	485	1942	O 417
542	"	M 833	740	"	C 230	38	"	M 693	259	1942	O 340	492	1941	M 753
543	1942	L 76	742	"	M 285	39	"	C 658	261	"	B 121	500	1942	O 368
545	"	PC 8	745	1941	C 717	40	"	M 788	265	"	O 303	503	1941	M 810
549	1941	C 582	746	"	M 741	45	1942	O 346	268	"	C 149	504	1942	O 366
562	1942	L 80	748	1942	A 130	49	1941	M 375	269	"	A 175	506	"	C 173
564	"	N 61	753	1941	M 507	54	1942	N 49	281	"	P 346	512	"	O 370
566	"	P 73	755	"	C 318	55	1941	M 921	283	1941	M 495	514	"	L 125
573	"	N 58	757	1942	O 318	56	1942	N 63	284	1942	P 384	515	"	O 388
574	"	PC 19	761	"	M 177	58	1941	M 695	287	1941	M 858	517	1941	M 584
577	1941	M 641	763	1941	C 443	60	1942	Pesh24	289	1942	FC 22	519	1942	Pesh 29
586	1942	O 275	765	"	N 243	61	"	A 141	296	"	P 376	520	1941	M 817
591	1941	M 500	768	"	C 503	66	"	C 150	299	"	Pesh35	524	1942	N 83
593	"	C 383	769	"	M 873	67	1941	M 411	301	"	P 337	526	"	A 156
594	"	M 940	773	"	L 480	68	1942	N 73	302	"	L 102	543	1941	M 737
595	1942	A 135	774	"	M 561	70	1941	M 727	306	"	P 395	545	1942	S 76
596	1941	M 736	776	1942	O 374	74	1942	S 60	308	"	C 228	546	"	P 230
597	1942	O 352	785	"	PC 28	77	1941	M 524	309	"	P 378	551	"	FC 33
599	1941	M 739	788	"	C 222	81	1942	L 118	311	"	O 325	557	"	P 406
600	"	C 287	790	1941	M 437	83	1941	M 387	314	"	C 330	560	"	C 342
602	"	M 806	792	1942	C 288	85	1942	B 102	316	"	P 331	561	"	O 213
604	1942	L 65	793	"	M 306	89	1941	C 719	321	1941	M 829	563	"	FC 38
607	"	A 145	795	"	C 232	90	1942	O 342	323	1942	B 151	574	1941	N 195
610	"	C 239	796	1941	M 895	92	1941	C 118	324	1941	M 861	577	"	M 690
613	"	R 64	798	1942	B 125	95	"	M 870	325	1942	O 389	580	1942	O 399
614	"	O 240	799	"	Pesh 21	98	"	C 604	327	1941	M 854	582	1941	M 906
617	1941	M 889	800	"	C 142	101	1942	O 343	328	1942	C 277	584	1942	B 118
618	"	C 242	801	"	O 339	102	1941	M 612	333	1941	M 571	587	1941	M 897
620	"	M 408	802	1941	C 372	105	1942	C 227	334	1942	S 77	587	1941	M 897
621	1942	C 32	803	1942	O 318	106	"	L 100	336	1941	M 944	588	1942	C 236
625	"	P 348	812	1941	M 477	108	"	P 65	337	1942	PC 30	590	"	M 427
627	"	N 14	814	1942	N 33	110	1941	M 796	338	1941	M 391	591	"	N 95
631	"	P 370	817	1941	M 389	113	"	" 636	340	1942	S 78	592	1941	M 891
634	"	Pesh 21	818	1942	P 410	115	1942	A 153	341	"	C 337	593	1942	O 408
635	"	P 194	822	1941	M 510	119	1941	M 733	342	1941	M 868	594	"	M 452
636	"	O 219	825	1942	C 121	123	"	C 539	344	1942	B 150	595	"	N 66
638	"	P 183	823	1941	M 394	124	"	M 682	346	1941	M 439	603	1941	M 855
641	"	S 21	821	1942	O 344	126	1942	O 286	347	1942	N 82	604	1942	O 395
647	"	B 97	833	"	M 288	131	"	L 114	348	"	B 123	606	"	L 119
649	1941	C 183	834	1941	C 116	136	"	C 170	350	"	C 324	608	"	O 392
651	"	M 539	835	1942	O 362	139	1941	M 908	352	"	M 501	610	1941	M 912
653	"	L 357	841	1941	C 618	142	1942	O 210	353	1941	" 601	611	1942	O 387
657	1942	P 170	847	1942	L 92	145	1941	C 415	355	1942	B 123	612	1941	M 506
658	"	A 186	848	1941	M 565	146	1942	O 260	357	1941	M 841	614	1942	O 391

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IC	A I R		IC	A I R		IC	A I R		IC	A I R		IC	A I R		IC	A I R	
615	1941	M 769	859	1942	M 120	130	1942	C 354	305	1942	M 145	477	1942	M 145	534		
618	1942	B 186	860	"	O 391	132	"	M 90	306	"	C 369	478	"	S 121			
621	"	P 365	861	"	M 296	134	"	C 233	307	"	M 67	479	"	C 390			
622	"	O 401	863	"	B 143	137	"	L 162	309	"	P 453	484	"	P 451			
629	"	L 134	868	"	M 4	138	"	C 251	311	"	F 129	485	"	Pesh 47			
630	"	S 75	870	"	C 291	143	"	M 17	316	1941	M 491	486	"	P 319			
632	"	Pesh 37	871	"	M 82	145	"	" 30	317	1942	O 432	488	"	C 360			
634	"	A 186	873	"	" 24	146	"	O 434	319	"	C 369	496	"	P 337			
639	1941	M 800	875	"	L 136	148	"	M 21	320	"	M 136	499	"	PC 47			
641	1942	A 189	876	"	M 271	150	"	C 275	323	"	C 353	503	"	B 214			
648	1941	M 505	879	"	B 154	152	"	M 212	324	"	M 204	504	"	P 466			
649	1942	P 240	880	"	Pesh 47	154	"	C 308	325	"	N 75	506	"	O 443			
652	"	L 95	881	"	M 56	156	"	M 97	329	"	B 183	508	"	B 206			
659	1941	M 434	884	"	" 26	159	"	L 135	331	"	Pesh 53	509	"	P 452			
660	1942	C 341	885	"	P 266	160	"	M 121	332	"	M 198	511	"	L 200			
661	"	B 105	886	"	M 70	161	"	" 134	334	"	C 356	512	"	C 452			
680	"	O 371	889	"	B 138	163	"	S 92	335	"	M 244	513	"	S 115			
684	"	L 142	895	"	M 256	164	"	M 79	338	"	C 351	515	"	M 356			
691	1941	M 713				165	"	Pesh 43	341	"	Pesh 42	516	"	C 136			
697	1942	L 152				167	"	M 258	342	"	P 307	518	"	A 225			
698	1941	M 552	IC	A I R		170	"	N 80	344	"	C 375	521	"	M 465			
702	1942	C 300	1	1942	PC 42	172	"	M 167	348	"	M 76	523	"	A 224			
709	"	N 88	3	"	M 161	174	"	O 397	349	"	C 389	524	"	M 532			
714	"	Pesh 27	8	"	P 417	176	"	M 18	350	"	P 455	525	"	C 382			
715	1941	N 226	11	"	M 154	179	"	P 456	351	"	M 39	531	"	O 291			
722	"	M 742	13	"	P 290	182	"	M 146	353	"	C 153	545	"	C 283			
724	1942	B 148	15	"	M 133	184	"	A 261	367	"	M 125	550	"	N 92			
725	1941	M 609	17	"	C 292	187	"	M 226	369	"	" 230	554	"	P 458			
728	1942	S 100	18	"	A 307	188	"	B 159	372	"	C 367	557	"	C 386			
729	1941	M 650	20	"	C 294	191	"	M 219	374	"	M 95	560	"	P 317			
732	1942	Pesh 89	22	"	M 84	193	"	PC 35	376	"	S 114	563	"	C 40			
734	"	C 342	24	"	C 429	195	"	M 78	378	"	M 291	564	"	Pesh 55			
735	"	M 357	30	"	M 103	196	"	P 432	381	"	O 321	566	"	P 320			
739	"	A 323	31	"	C 306	199	"	M 123	384	"	M 151	567	"	O 412			
740	"	M 440	33	"	M 202	200	"	L 121	385	"	" 287	568	"	C 241			
741	"	S 91	34	"	B 155	202	"	M 166	386	"	A 219	572	"	L 171			
743	"	M 276	39	"	M 129	203	"	O 413	387	"	M 426	574	"	C 61			
744	"	O 427	42	"	C 418	204	"	M 210	389	"	O 439	578	"	A 220			
748	1941	M 528	48	"	M 159	206	"	P 304	390	"	M 58	579	"	C 295			
749	1942	C 309	50	"	" 193	207	"	M 277	394	"	PC 44	582	"	P 329			
753	"	PC 31	54	"	O 407	208	"	P 303	399	"	C 229	585	"	C 290			
758	"	A 194	55	"	M 62	209	"	A 295	400	"	M 102	586	"	M 353			
765	"	M 278	60	"	O 416	218	"	M 200	401	"	B 178	588	"	C 401			
766	"	N 96	62	"	M 232	220	1941	N 181	407	"	M 273	595	"	M 429			
768	"	A 336	66	"	S 95	227	1942	M 92	409	"	O 448	606	"	B 206			
769	"	P 397	67	"	M 143	228	"	O 425	410	"	M 105	607	"	M 468			
774	"	M 101	69	"	O 327	229	"	M 119	411	"	O 435	609	"	" 295			
776	"	P 414	74	"	M 156	230	"	Pesh 45	415	"	A 361	610	"	Pesh 49			
780	"	M 86	77	1941	N 294	232	"	M 179	420	"	B 161	612	"	M 44			
781	"	C 280	79	1942	M 149	234	"	C 321	437	"	M 326	616	"	O 317			
782	"	P 238	81	"	" 111	238	"	M 88	439	1940	N 292	617	"	M 404			
784	"	M 254	83	"	Pesh 23	240	"	L 162	440	1942	M 531	619	"	L 179			
787	"	P 276	84	"	M 170	242	"	M 104	441	"	B 154	627	"	M 552			
791	"	M 122	86	"	" 152	243	"	O 423	442	"	M 420	628	"	A 200			
793	"	PC 39	87	"	L 126	244	"	M 139	443	"	C 406	631	"	L 203			
794	"	M 1	91	"	M 173	248	"	C 343	444	"	M 415	632	"	C 425			
797	"	C 289	94	"	" 116	253	"	M 209	446	"	C 546	633	"	B 193			
798	"	M 114	97	"	" 73	260	"	P 311	451	"	M 594	639	"	S 82			
801	"	L 147	100	"	O 410	261	"	M 247	452	"	Pesh 54	640	"	C 428			
805	"	O 394	103	"	M 205	264	"	S 74	453	"	M 23	641	"	B 207			
806	1941	N 351	106	"	C 281	265	"	M 34	454	"	C 226	642	"	C 331			
808	1942	M 294	109	"	M 172	266	"	B 190	455	"	M 530	647	"	L 192			
809	"	O 399	111	"	O 353	268	"	P 422	456	"	C 60	650	"	C 444			
810	1941	M 629	112	"	M 27	272	"	M 143	457	"	M 347	651	"	B 215			
813	1942	" 238	113	"	" 216	273	"	C 370	458	"	B 175	653	"	" 198			
814	"	S 98	116	"	B 184	275	"	M 282	459	"	M 530	654	"	M 532			
815	"	M 5	117	"	M 169	277	"	O 431	460	"	A 222	655	"	C 423			
822	"	C 1	118	"	L 164	279	"	C 371	461	"	M 444	658	"	O 447			
847	"	B 177	119	"	M 35	284	"	M 280	462	"	L 190	660	"	P 460			
848	"	M 204	120	"	B 174	286	"	O 424	464	"	C 44	667	"	L 201			
849	"	B 178	122	"	M 16	288	"	M 242	466	"	O 438	670	"	A 223			
850	"	L 151	123	"	B 146	292	"	L 138	468	"	L 163	671	"	L 205			
852	"	B 152	126	"	M 127	298	"	PC 37	470	"	C 42	674	"	C 442			
854	"	A 265	127	"	O 426	301	"	M 36	472	"	N 111	675	"	L 164			
855	"	" 267	128	"	M 28	308	"	O 414	476	"	C 224	681	"	B 203			

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IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
688	1942 C 589	28	1942 M 283	199	1942 A 267	481	1942 P 418	689	1942 L 237
686	" M 425	30	" C 474	200	" C 468	483	" PC 57	693	" C 510
688	" B 205	33	" " 458	203	" PC 40	488	" C 470	697	" M 558
689	" M 300	37	" A 238	206	" S 102	490	" M 483	724	1943 L 26
692	" N 107	43	" S 86	210	" Pesh 61	493	" O 458	725	1942 M 608
693	" M 423	44	" M 405	211	" M 495	495	" P 408	726	" A 338
695	" A 233	45	" L 194	218	" Pesh 57	497	" L 217	728	" M 612
701	" M 452	54	" P 363	220	" S 89	512	1943 N 7	730	" O 498
702	" C 451	56	" A 253	223	" P 474	514	1942 M 487	732	" M 632
703	" M 422	57	" P 386	227	" A 267	524	" N 124	734	" O 496
705	" Pesh 51	59	" Pesh 58	264	" P 477	526	" M 478	735	1943 L 1
707	" A 221	62	" P 383	265	" PC 50	529	" O 493	740	1942 PC 87
709	" M 412	64	" M 385	270	" P 491	531	" M 507	743	1943 O 29
710	" B 205	65	" " 502	273	" O 24	533	" P 508	747	1942 M 606
711	" S 180	66	" C 467	274	" M 528	538	" M 456	750	" O 508
713	" M 471	67	" M 398	277	" B 218	543	" N 117	753	1943 C 31
715	" A 227	68	" B 208	279	" Pesh 48	545	" C 486	754	1942 PC 61
721	" M 418	73	" M 505	280	" C 407	548	" O 506	758	" C 532
722	" Pesh 63	75	" " 357	286	" B 199	551	" C 498	759	1943 L 8
724	1941 M 593	76	" C 467	290	" M 450	560	" B 272	762	1942 C 544
728	1942 O 460	77	" M 381	292	" L 232	561	" O 490	765	" M 602
731	" M 470	78	" " 514	294	" M 509	562	" A 349	767	" O 478
732	" S 85	81	" " 405	296	" S 83	565	" M 474	770	" Pesh 65
733	" M 421	82	" B 217	298	" M 523	569	" A 337	771	" M 610
735	" B 212	84	" M 481	301	" B 256	570	" C 445	773	1943 S 46
737	" O 441	86	" " 511	302	" M 417	574	" B 279	779	" N 20
739	" L 186	87	" O 488	304	" P 313	575	" A 347	781	1942 B 274
745	" M 317	88	" M 419	306	" M 455	577	" Pesh 65	783	1943 P 32
748	" N 102	89	" " 413	308	" C 138	584	" S 81		203 I C
749	" M 352	90	" C 571	311	" M 446	586	" A 339		IC
750	" S 134	94	" M 453	315	" L 255	589	" P 506		AIR
753	" M 390	97	" P 388	317	" N 119	592	" C 529	1	1942 PC 64
754	" N 86	101	" N 99	321	" B 257	593	" B 278	5	" M 604
758	" M 389	105	" P 478	323	" M 485	595	" N 115	7	" L 265
759	" B 185	107	" Pesh 41	326	" C 509	597	" B 273	9	" A 254
766	" M 299	109	" C 436	328	" B 253	599	" O 483	12	" O 462
768	" A 253	111	" O 482	329	" S 87	601	" C 522	16	" P 439
769	" M 415	113	" P 479	331	" P 481	603	" M 603	17	" M 614
770	" B 216	114	" L 173	340	" L 215	604	" C 524	27	" B 251
771	" M 462	122	" M 316	343	" C 379	607	" M 609	34	" L 260
772	" S 80	123	" P 480	347	" L 234	609	" L 256	40	1943 P 41
773	" M 478	124	" M 419	350	" A 201	610	" M 601	43	" N 12
774	" B 220	125	" C 472	378	" O 480	611	" A 324	45	1942 M 539
776	" M 503	126	" O 481	379	" Pesh 50	614	" C 521	60	1943 P 4
778	" C 461	128	" P 435	380	" M 519	615	" P 431	62	" L 5
781	" M 375	133	" L 207	382	" O 473	617	" S 117	65	1942 P 429
782	" " 327	135	" N 97	389	" C 498	620	" A 319	67	1943 N 23
785	" " 403	137	" C 441	392	" B 227	621	" N 114	70	" P 3
786	" P 369	139	" M 501	398	" O 357	623	" A 334	71	" O 11
788	" B 221	140	" L 211	402	" M 525	626	" S 113	74	1942 A 353
790	" M 388	143	" A 248	405	" S 65	627	" Pesh 74	81	" " 344
791	" O 444	147	" C 478	416	" B 263	629	" M 581	84	1943 N 1
795	" P 391	149	" M 297	420	" M 464	631	" S 112	89	" C 30
797	" M 517	150	" C 464	421	" L 240	633	" B 276	90	" S 54
800	" A 251	152	" S 79	426	" M 413	634	" P 419	91	1942 Pesh 79
		153	" C 495	427	1943 N 5	635	" C 513	93	" A 257
		155	" Pesh 60	429	1942 M 512	637	" P 420	95	" P 441
		157	" B 191	430	" B 266	640	" Pesh 70	97	" A 365
1	1942 PC 54	159	" M 472	433	" L 254	643	1943 N 70	116	" B 231
6	" M 533	162	" A 260	434	" C 481	648	1942 B 280	125	1943 O 24
7	" A 263	163	" C 480	437	" L 228	651	" O 497	128	1942 A 323
8	" M 320	164	" A 258	442	" C 488	653	" A 320	131	" O 465
9	" N 103	166	" B 224	449	" L 252	657	" P 425	135	" A 326
12	" A 260	170	" M 535	450	" Pesh 62	659	1943 C 73	137	" Pesh 76
13	" C 466	174	" L 209	451	" M 522	660	1942 B 232	139	" B 260
14	" M 534	177	" S 99	452	" L 253	663	" C 514	143	1943 O 1
15	" L 214	178	" M 556	454	1943 O 174	666	1943 P 13	154	1942 C 533
17	" M 360	181	" C 493	456	1942 M 423	668	1942 Pesh 73	159	" P 444
18	" A 251	183	" S 96	458	" A 302	670	" L 257	162	1943 N 22
19	" M 449	184	" M 553	465	" N 122	674	" M 580	163	" P 109
20	1943 P 64	185	" N 105	468	" M 354	677	1943 C 121	166	1942 L 153
21	1942 M 346	188	" B 229	470	" C 505	678	1942 A 330	177	" M 674
22	" A 263	191	" M 554	475	" M 442	679	1943 C 88	178	1943 L 27
23	" M 460	193	" C 496	477	" C 452	680	" P 33	179	1942 M 397
25	" N 108	196	" B 248	480	" N 140	681	1942 S 106	180	1943 C 41

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203 I C		203 I C		203 I C		203 I C		203 I C	
IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
181	1943 S 55	269	1942 C 542	404	1942 L 243	499	1943 O 51	587	1943 O 36
182	1942 M 630	271	" M 660	415	" Pesh 77	500	1942 M 657	588	1942 M 351
184	" C 550	272	" " 662	417	" M 527	501	" L 296	590	" A 442
187	" M 595	273	" L 279	418	" P 470	504	" M 600	591	" M 700
188	" C 553	275	1943 P 44	420	" C 552	505	1943 O 44	592	" L 326
192	" M 662	279	1942 B 310	421	" M 664	507	1942 M 682	594	" M 375
193	1943 N 9	282	" P 471	422	1943 P 48	510	1943 O 41	595	" L 304
195	1942 M 622	284	" M 664	425	1942 M 550	513	1942 M 398	596	" M 655
199	1943 N 4	285	" O 449	426	" C 566	514	" L 331	597	" A 438
200	1942 M 391	295	" L 280	428	" A 409	516	" M 371	598	" M 551
203	" Pesh 81	300	" Pesh 63	429	" C 569	517	" B 330	599	" A 446
205	" M 653	303	" A 390	433	" M 669	518	" C 537	603	" B 312
206	" N 132	307	" B 305	434	" O 499	521	" P 489	605	" L 301
207	" C 562	310	" A 379	437	" P 467	524	" O 429	607	" M 343
212	" M 663	321	" M 672	439	" N 186	526	" M 384	609	" S 167
214	" N 127	322	" B 297	442	1943 P 31	528	" Pesh 88	611	" B 300
220	" M 625	325	" M 662	443	1942 B 317	529	" M 396	613	1943 O 123
222	" C 567	328	" A 394	449	1943 O 38	530	" A 439	615	1942 M 705
223	" A 358	330	" B 316	453	" PC 4	532	" N 133	618	1943 PC 1
228	" M 627	331	" A 396	456	1942 B 328	535	" B 306	620	1942 M 715
229	" O 494	336	" C 559	457	" M 585	538	1943 O 45	621	1943 O 190
231	1943 " 33	339	" B 309	458	" Pesh 84	540	" N 77	624	1942 Pesh 91
233	1942 M 658	341	1943 N 81	459	" B 321	542	1942 L 300	625	" C 607
235	" " 661	344	1942 S 104	461	" M 668	544	" M 596	628	1943 N 111
236	1943 O 35	345	" M 482	462	" L 275	546	" A 400	630	1942 C 586
238	1942 B 268	346	" O 464	467	" A 424	548	" C 412	632	" B 241
243	" M 656	348	" L 234	469	" C 516	555	1943 O 99	634	" O 132
244	1943 O 27	352	" B 284	475	" M 599	561	1942 PC 69	641	1943 O 132
246	1942 M 644	357	" S 97	476	1943 N 79	564	" L 298	643	1942 B 341
248	1943 O 16	359	" B 314	478	1942 M 679	566	" S 143	644	" M 707
249	1942 M 649	361	1943 O 105	479	" " 654	567	" M 665	645	" B 344
250	" N 138	363	1942 L 287	481	" " 597	569	" B 332	646	" S 162
252	" S 120	365	" B 289	482	" S 139	573	" N 126	648	" M 693
253	1943 O 14	368	" C 530	485	" C 568	574	" M 345	655	" B 322
256	" C 29	371	" A 410	486	" A 441	576	" C 613	659	" M 675
257	1942 B 316	389	" FC 47	488	" L 271	579	1943 O 57	662	1943 P 80
258	" C 527	391	1943 O 54	493	1943 N 88	580	1942 C 606	664	1942 A 402
261	" B 302	395	1942 L 267	495	1942 A 443	581	" B 328	670	" M 675
265	1943 C 25	400	1943 N 95	496	" L 302	584	" C 616	671	" O 491
266	1942 M 586	401	1942 FC 48	498	" M 690	585	" M 691	672	" M 552

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Bakhshish Singh v. Sawan Singh, Regular Second Appeal No. 448 of 1940	Overruled in (29) A.I.R. 1942 Lah. 298 (F. B.).
Bishna v. Committee of Gurudwara Sudhal, ('84) 15 Lah. 66=86 P.L.R. 426=(21) A. I. R. 1934 Lah. 390=151 I. C. 890	Overruled in (29) A. I. R. 1942 Lah. 19 (F. B.).
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Nand Ram v. Ishar, ('26) 27 P. L. R. 27 = 7 L.L.J. 600 = (18) A. I. R. 1926 Lah. 128 = 92 I. C. 597	Impliedly Overruled in (29) A. I. R. 1942 Lah. 217 (F.B.).
Narain Singh v. Gurbakhsh Singh, ('28) 9 Lah. 306 = 29 P.L.R. 399 = (15) A.I.R. 1928 Lah. 119 = 107 I. C. 281	Overruled in (29) A. I. R. 1942 Lah. 211 (F.B.).
Nihalu Ram Chela Ram v. Radhu Ram Hukmi Ram, ('34) 16 Lah. 258 = 37 P. L. R. 478 = (21) A.I.R. 1934 Lah. 885 = 155 I. C. 1074	Overruled in (29) A. I. R. 1942 Lah. 50 (F. B.).
Pahlad Rai v. Shiv Ram, ('27) 8 Lah. 681 = 29 P. L. R. 70 = (14) A. I. R. 1927 Lah. 540 = 102 I. C. 843	Overruled in (29) A. I. R. 1942 Lah. 95 (F.B.).
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Ramchandar v. Sarupa, ('39) I.L.R. (1939) Lah. 108 = 41 P.L.R. 486 = ('26) A. I. R. 1939 Lah. 113 = 184 I. C. 393	Overruled in (29) A. I. R. 1942 Lah. 153 (F. B.).
Ram Parkash v. Jodh Singh, Exn. F. A. No. 422 of 1939, Decided on 2nd April 1940	Reversed in (29) A. I. R. 1942 Lah. 280.
Toka Ram Singh v. Fazal Ahmad, ('36) 17 Lah. 606 = 38 P.L.R. 611 = (23) A.I.R. 1936 Lah. 785 = 166 I. C. 292	Overruled in (29) A. I. R. 1942 Lah. 95 (F.B.).

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Lahore High Court

(29) A. I. R. 1942 Lahore 1

FULL BENCH

YOUNG C. J., TEK CHAND, MONROE,
DIN MOHAMMAD AND SALE JJ.

and afterwards

TEK CHAND AND DIN MOHAMMAD JJ.

Karam Dad and others — Plaintiffs
— Appellants

v.

Mt. Mohammad Bibi and others

— Defendants — Respondents.

First Appeal No. 446 of 1939, Decided on 8th July 1941, from decree of the Senior Sub-Judge, Sialkot, D/- 28th August 1939.

(a) Custom (Punjab) — Succession — Non-ancestral property — Bajwa Jats of Sialkot District — Daughters exclude collaterals (Per *Tek Chand J.*, in final judgment).

Among Bajwa Jats of Sialkot district, daughters succeed to the non-ancestral property of a sonless proprietor in preference to his collaterals of the tenth degree. [P 6c,d]

(b) Custom — Riway-i-am affecting rights of females adversely — Presumption of correctness is very weak — Few instances are sufficient to rebut it (Per *Tek Chand J.*, in final judgment).

Where a custom recorded in the Riway-i-am affects adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities the initial presumption in favour of its correctness is considerably weakened and a few instances are sufficient to rebut it: ('41) 28 A I R 1941 P C 21, *Rel. on*; ('37) 24 A I R 1937 Lah 451 (F B) and ('36) 23 A I R 1936 Lah 408, *Held not good law*. [P 5d,e]

(c) Civil P. C. (1908), O. 6, R. 17 and S. 107 — Plaintiff throughout asserting that property was non-ancestral — Issue framed and Court finding property to be non-ancestral — Plaintiff seeking to amend plaint at late stage in appeal by stating that property was ancestral — Amendment held introduced inconsistent case

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and could not be allowed at late stage — Even if amendment were allowed case held could not be remanded for further enquiry—O. 41, R. 25 or R. 27 held did not apply (Per *Tek Chand J.*, in final judgment).

The plaintiff's case throughout had been that the property in suit was non-ancestral. An issue as to the ancestral character of the property was actually framed, evidence led and a finding recorded that it was non-ancestral. At a late stage in the appeal the plaintiff sought to amend the plaint by stating that the property was ancestral :

Held that the amendment introduced an inconsistent case and could not be allowed at a late stage in the appeal. [P 6a]

Held further that even if the amendment were allowed it would necessitate a remand for further enquiry as to ancestral nature of the property which could not be allowed as neither O. 41, R. 25 nor O. 41, R. 27 had any application to the case. Nor could S. 151 be invoked on the facts of the case. [P 6b,c]

Asadullah Khan and Bashir Ahmad —

for Appellants.

Malik Barkat Ali and Shaukat Ali —

for Respondents 1 to 4.

ORDER OF REFERENCE

Tek Chand and Din Mohammad JJ.—

The property in dispute belonged to one Sardar Khan, a Bajwa Jat of Mauza Fatehpur, Tahsil Pasrur, District Sialkot. Sardar Khan died on 21st July 1926, leaving him surviving a widow, Mt. Mohammad Bibi, (defendant 1), a step-mother Mt. Raj Bibi (defendant 5) and three daughters from Mt. Mohammad Bibi named Mt. Sakina Bibi (defendant 2), Mt. Rasulan (defendant 3) and Mt. Sharifan (defendant 4). On 6th November 1926, the Patwari entered a mutation reporting the death of Sardar Khan and stating that his widow, Mt. Mohammad Bibi, was his heir. When the mutation came up before the revenue officer, Mt. Mohammad Bibi stated that she had got three daughters from Sardar Khan and that the

land be mutated in their names. Mt. Raj Bibi also stated that she had no objection to this being done. Accordingly, the mutation was sanctioned in favour of the three daughters on 14th November 1926, and they have been in possession of the land since. On 12th November 1938, the plaintiffs-appellants, 15 in number, describing themselves as the collaterals of Sardar Khan in the tenth degree, brought a suit for a declaration that the alienation effected by Mt. Mohammad Bibi in favour of her daughters, Mt. Sakina Bibi, Mt. Rasulan and Mt. Sharifan, by mutation dated 14th November 1926, was ineffectual as against their reversionary rights after the death or remarriage of Mt. Mohammad Bibi (defendant 1). They based their claim on the custom alleged to prevail in the tribe, according to which collaterals of a male sonless proprietor, howsoever remote, excluded daughters in succession to the property of a sonless proprietor.

The suit was resisted by Mt. Mohammad Bibi and her daughters on various grounds. They denied that the plaintiffs were collaterals of Sardar Khan. They further pleaded that, even if the relationship was proved, the plaintiffs had no right to succeed against the daughters who, according to custom, were preferential heirs, the alienation in question being nothing more than acceleration of succession. They also averred that the plaintiff had acquiesced in the alienation, that, in any case, the possession of defendants 2 to 4 was adverse and the suit was barred by limitation. Neither the plaint nor the written statement contained any averment as to the nature of the land. The plaintiffs' pleader, however, when examined before framing the issues, stated that the plaintiffs did not claim the land to be ancestral. On these pleadings the following issues were framed :

- (1) Is the suit within limitation ? (On plaintiffs).
- (2) Have defendants 2 to 4 been in adverse possession of the land in suit for more than 12 years qua the plaintiffs ? (On defendants).
- (3) Are the plaintiffs collaterals of Sardar Khan deceased ? and, if so,
- (4) Is the land ancestral ? (On defendants).
- (5) Are the parties governed by any such custom according to which the plaintiffs are preferential heirs to the estate of Sardar Khan deceased as against his daughters ? (On plaintiffs).
- (6) Have the plaintiffs acquiesced in the mutation in favour of the daughters and are consequently barred from bringing this suit ? (7) Relief.

The learned Subordinate Judge found that the plaintiffs were collaterals of Sardar Khan in the tenth degree that the land was ancestral qua them, that no acquiescence on their part was proved, but that the suit,

having been instituted more than six years after the alienation was barred by time under the Punjab (Custom) Limitation Act, 1 of 1920. On the issue relating to custom the learned Judge, following certain observations in the Full Bench decision of this Court reported as 18 Lah 594,¹ declined to consider the defendants' evidence, including copies of judicial decisions and mutation records, which they had produced in proof of instances of succession of daughters in preference to collaterals among Jats of Sialkot District. The learned Judge observed that these instances, as held by the Full Bench could not establish a legal and binding custom which "must have been used so long that the memory of man runneth not to the contrary." The learned Judge, accordingly, relying on the presumption arising from entries in the riwaj-i-am of the district prepared in the settlement of 1916, held that the plaintiffs were preferential heirs as against the daughters. On his finding on the question of limitation, however, he dismissed the suit. From this decree the plaintiffs have preferred a first appeal to this Court.

The findings of the learned Subordinate Judge that the land is ancestral qua the plaintiffs, and that the suit is barred by limitation, are obviously wrong and Mr. Barkat Ali for the defendants-respondents has not attempted to support them. There is not a tittle of evidence on the record to show that the land in dispute was owned by the common ancestor and descended from him to Sardar Khan. The learned Subordinate Judge has referred to the statement of Piran Ditta, plaintiff who, in his evidence as P. w. 7, had stated that the village was founded by two brothers, Sohrab and Mehraraj, who were ancestors of the plaintiffs and Sardar Khan respectively. Assuming, that this statement is correct, it conclusively shows that the founder was not the common ancestor. It proves that the land was acquired by his son, and therefore, it could not be ancestral qua the plaintiffs in the hands of Sardar Khan. The excerpt from revenue papers (Ex. D. W. 2/1) prepared by the special moharrir throws no light on the point and there is nothing else to support the learned Judge's finding.

If the land is not ancestral, the Punjab (Customs) Limitation Act, 1920, does not apply; and the case is governed by Art. 141, Limitation Act, under which the plaintiffs

1. (37) 24 A I R 1937 Lah 451; 169 I C 909; ILR (1937) 13 Lah 594; 39 P L R 349 (FB), Bahadur v. Mt. Nihal Kaur.

^a had 12 years to sue from the date of the alienation. The suit was instituted two days before the expiry of that period and was, therefore, within time. It may be mentioned, however, that even if the Punjab (Customs) Limitation Act were applicable, the suit of four of the plaintiffs, Ghulam Hussain (No. 4), Ghulam Hassan (No. 8), Mohammad Niwas (No. 15) and Inayat Ullah (No. 14) could not be barred by time. They were minors at the date of the alienation and had not attained majority when the suit was instituted. The learned Judge has erroneously assumed that they were born after the alienation. According to the plaintiff's evidence, they were respectively 14, 14, 16 and 18 years of age in 1939, and there is no rebuttal by the defendants. These plaintiffs were therefore in existence when the cause of action arose and are entitled to the benefit of s. 6, Limitation Act. The findings of the learned Subordinate Judge on both these points must, accordingly, be set aside, and it must be held that the suit is not barred by limitation and that the land is non-ancestral.

^c The real question for determination in the case is whether under the custom, prevailing among Bajwa Jats of Sialkot District, collaterals of the tenth degree exclude daughters in succession to non-ancestral property. The onus of issue 5, which related to this matter, was placed on the plaintiffs and they sought to discharge it by the entries in the *riwaj-i-am* of 1916 in which in the "answer" to question 47 it is recorded that "married daughters do not inherit in presence of the collaterals." It was conceded by counsel for the defendants that there is a presumption of correctness attaching to this entry, but he contended that the presumption was very weak as the compiler of the *riwaj-i-am* himself had appended a "remark," to the "answer" to the effect that it was asserted before him that ^a "under the influence of judicial decisions daughters succeed in preference to collaterals of fifth or more remote degrees." This "remark" in the *riwaj-i-am* is followed by eight instances, in which daughters actually succeeded to the exclusion of collaterals of different degrees. The defendants, in addition to relying on these eight instances, placed on the record documentary proof of the following instances in which daughters were preferred: (1) Ex. D-18, judgment of a case decided by Lala Mul Chand, Subordinate Judge, on 18th April 1913; (2) Ex. D-20, judgment of Mr. Harrison, District Judge, Sialkot, dated 12th March 1913; (3) Ex. D-22,

judgment of the Senior Subordinate Judge, Sialkot, dated 9th December 1924; (4) Ex. D-19, judgment of the District Judge, Sialkot, dated 16th December 1929; and (5) Ex. D-17, mutation dated 23rd January 1928. The defendants further cited eight instances in which the dispute was finally settled by decisions of this Court and in each of which the custom actually prevailing was found to be contrary to the entries in the *riwaj-i-am*. These decisions are reported as 4 Lah 99,² 10 Lah 485,³ 10 Lah 489,⁴ AIR 1930 Lah 724,⁵ AIR 1935 Lah 106,⁶ 37 P L R 282,⁷ 16 Lah 616⁸ and 16 Lah 985.⁸

The defendants thus contend that there are at least 21 instances in which the daughters had successfully established their right to succeed to non-ancestral property of a sonless proprietor in preference to collaterals. The appellants, on the other hand, rely on 18 Lah 594¹ where a Full Bench of this Court had found in favour of the collaterals. They maintain that this is the most recent judicial instance of succession among the Jats of the Sialkot District, and they further contend, on the strength of certain observations in the judgment of the Full Bench, that the instances relied upon by the defendants being too "recent" cannot be taken into consideration in proving the custom prevailing in the tribe. In that case, while considering what evidence was necessary to establish a custom the learned Judges referred to Blackstone's Commentaries, in which it is stated that a custom in order that it may be legal and binding must have been used so long that the memory of man runneth not to the contrary; so that if anyone can show the beginning of it, it is no good custom.

Following this rule the learned Judges rejected the instances relied upon by the daughters as "modern." They further observed that "custom once established can only at this time be altered by legislation." Mr. Barkat Ali for the defendants-respondents has urged that both these propositions, ^h though true of "custom" as it prevails in England, are not applicable to India. He

2. ('23) 10 AIR 1923 Lah 401 : 76 I C 921 : 4 Lah 99, Budha v. Mt. Fatima Bibi.

3. ('29) 16 AIR 1929 Lah 58 : 116 I C 189 : 10 Lah 485 : 30 P L R 678, Shahamad v. Mt. Muhammad Bibi.

4. ('29) 16 AIR 1929 Lah 465 : 118 I C 398 : 10 Lah 489 : 30 P L R 618, Said v. Mt. Said Bibi.

5. ('30) 17 AIR 1930 Lah 724 : 125 I C 609, Khuda Dad v. Mt. Rabia Bibi.

6. ('35) 22 AIR 1935 Lah 106 : 158 I C 194 : 16 Lah 616 : 37 P L R 732, Mangal Singh v. Mr. Indar Kuar.

7. ('36) 23 AIR 1936 Lah 946 : 162 I C 42 : 37 P L R 282, Inayat Ali v. Muhammad Hussain.

8. ('36) 23 AIR 1936 Lah 339 : 181 I C 24 : 16 Lah 985 : 38 P L R 509, Mahi v. Mt. Barkate.

^a refers to 45 Cal 450⁹ at p. 460 and 5 Lah 200¹⁰ at page 206 in which their Lordships of the Privy Council pointed out the difficulty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here.

Again in 5 Luck 70¹¹ at page 75 their Lordships observed that the prevalence of customary rules of succession in provinces like Oudh and the Punjab must be proved by satisfactory evidence, but "without insisting on the rigorous and technical rules which would be applicable to such a case in England." Courts in British India have, from the very beginning, held that the principle ^b of English Common Law, that a custom is not proved if it is shown not to have been immemorial does not apply in this country. As pointed out by Sir John Edge C. J. in 17 ALL 87¹² at page 92 :

To apply such a principle (to these provinces) would be to destroy many customary rights of modern growth in villages and other places. The Statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right, claimed to have been enjoyed as by local custom, was enjoyed. And, in our opinion, it would be inexpedient and fraught with the risk of disturbing perfectly reasonable and advantageous local usages regarded and observed by all concerned as custom to attempt ^c to prescribe any such period.

Similarly, Chatterji and Rattigan JJ. in 34 P R 1907¹³ remarked that :

There is in this province no rule of law, which prescribes any period during which a custom, in order to be valid and enforceable, must have been observed. It is sufficient to show that the custom actually prevails, and is generally observed in the tribe to which the parties belong, and there is no necessity to go further and to attempt to prove the impossible, viz., that it has been observed in the tribe from a period to which the memory of man runneth not to the contrary.

^d The law reports are full of instances in which customs which have been uniformly and consistently followed for a period of 20 years or so have been held to be legal and binding. Nor does custom in India possess the element of invariability which attaches to it in England, so that it can be altered only by legislation. The Privy Council laid down as far back as 1863 in the well known

case of 9 M I A 195¹⁴ that customs may, as they are adopted voluntarily, be changed or lost by desuetude. For a very illuminating discussion on this subject, reference may be made to the judgment of Sir Raymond West in 4 Bom 545.¹⁵ Referring to the statutory provisions which enjoin the Courts in India to recognize the customs and usages of the people, the learned Judge pointed out that the sanction behind such customs and usages is the will of the community. It is by that will that a particular custom was adopted and it is by that will that it might be changed :

If the usage is variable at the will of the community, it must be enforced in its slowly changing phases or else the behest of the sovereign will eventually be defeated. As the mind of the community becomes enlightened, its legal convictions will change, and this will constitute a change in its common law as that law must from time to time be recognized and recorded in the Courts.

In the Punjab these principles have been recognized from the very beginning and there are innumerable reported cases in which they have been acted upon. As observed by Chatterji J. in 110 P R 1906¹⁶ at p. 407 custom is in a "fluid state" in the Punjab and whenever it is established that a formerly existing custom has fallen into desuetude and has been substituted by another the Courts have felt themselves bound to enforce the latter to the exclusion of the former. But while a particular custom may change and give place to another it is necessary that this must be established by the clearest and most satisfactory evidence, as to what the prevailing custom is. And one of the most satisfactory pieces of evidence is proof of instances in which the alleged custom has been followed and these instances are of great value if they are supported by judicial decisions. Indeed, their Lordships of the Privy Council have recently held that when a custom or usage is repeatedly brought to the notice of the Courts of a country the Court ^h may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. See also A I R 1936 P C 147.¹⁷ These previous decisions do not appear to have been brought to the notice of the learned Judges, who decided 18 Lah 594¹ and with great respect we think that several of the propositions laid down

9. ('17) 4 A I R 1917 P C 181 : 43 I C 306 : 45 Cal 450 : 45 I A 10 : 12 S L R 104 (P C), Abdul Hussein Khan v. Mt. Bibi Sona Dero.

10. ('24) 11 AIR 1924 P C 118 : 80 I C 965 : 51 I A 182 : 5 Lah 200 (P C), Durga Devi v. Shambhu Nath.

11. ('20) 17 AIR 1920 P C 85 : 121 I C 517 : 57 I A 29 : 5 Luck 70 (P C), Roshan Ali Khan v. Asghar Ali.

12. ('95) 17 All 87 : 1895 A W N 10, Kuar Sen v. Marazman.

13. ('07) 34 P R 1907, Maharaj Narain v. Banoji.

14. (1864) 9 M I A 195 : 1 W R 1 : 2 Sar 10 : 1 Suther 501 (P C), Abraham v. Abraham.

15. ('80) 4 Bom 545, Mathura Naikin v. Esu Naikin.

16. ('06) 110 P R 1906 : 81 P L R 1907 : 59 P W R 1907 (F B), Daya Ram v. Sohail Singh.

17. ('36) 23 A I R 1936 P C 147 : 162 I C 461, Amissah v. Krahah.

^a in their judgment are too widely expressed, and the case requires re-consideration by a larger Bench. We accordingly refer this case to a Full Bench and direct that the papers be laid before the learned Chief Justice for constituting a Bench of five Judges for the purpose.

Order of the Full Bench

The Privy Council in I L R (1941) Lah 154¹⁸ has now decided several of the points raised in this appeal. The Full Bench decision reported in I L R (1937) Lah 594¹ has dealt with other aspects of this appeal also. The appeal is, therefore, remanded to the ^b Division Bench to be dealt with in the light of these two decisions.

Final Judgment

Tek Chand J. — The facts of this case are set out in detail in our order of 13th December 1940 and it is not necessary to repeat them here. By that order, we had referred the case to a larger Bench for consideration of certain propositions which had been laid down by a Full Bench of this Court in 18 Lah 594,¹ the parties to which, like those in the present case, were Bajwa Jats of Sialkot District. A Full Bench of five Judges was accordingly constituted to ^c hear the reference. Before the hearing of the case by the Full Bench, however, their Lordships of the Privy Council had delivered their judgment in I L R (1941) Lah 154¹⁸ in which all the questions requiring decision by the Full Bench had been decided and authoritatively settled by that high tribunal. Their Lordships had fully reviewed 18 Lah 594¹ and not approved several propositions laid down in it. In view of this pronouncement by their Lordships, the Full Bench did not think it necessary to hear the case, and returned it to this Bench for disposal in the light of the decision in I L R (1941) ^d Lah 154.¹⁸ At the hearing before us today Mr. Bashir Ahmad for the plaintiff-appellant stated that if the finding that the land in dispute was non-ancestral qua the plaintiff stood, he had nothing to say on the merits, and that it must be taken as settled that among Bajwa Jats of Sialkot District daughters succeed to the non-ancestral property of a sonless proprietor in preference to his collaterals. He conceded that in view of the decision of the Privy Council the onus on the daughters was very light and that it must be held to have been discharged fully

by the instances, which are set out in detail in the referring order. He also admitted ^e that the two decided cases in his favour, A I R 1936 Lah 403¹⁹ and 18 Lah 594,¹ have been adversely criticised by the Privy Council and are no longer of any value.

The learned counsel, however, asked us to allow the plaintiff to amend the plaint and for this purpose he presented an application under S. 107 and O. 6, R. 17, Civil P. C., for permission to amend the plaint, so as to enable the plaintiff "to allege" that the land in dispute was ancestral qua the plaintiffs and that according to the custom prevailing in the tribe collaterals of the tenth or remoter degrees were entitled to ^f succeed to ancestral property of a sonless proprietor in preference to his daughters. After hearing Mr. Bashir Ahmad at great length we are unable to accede to this prayer. As pointed out in the referring order, though it was not specifically stated in the plaint as to whether the land was ancestral or not, after the written statement had been filed the plaintiffs' pleader made a statement on 14th December 1936, that "the plaintiffs did not claim the land as ancestral." The defendants, who had raised the plea of limitation stated, on the contrary, ^g that the land was ancestral. Upon this, one of the issues framed was "whether the land was ancestral" (issue 4). Both parties led evidence on this issue and the learned Subordinate Judge recorded a finding that the land was ancestral. In the memorandum of appeal, presented in this Court by the plaintiff-appellants, it was urged that the finding of the lower Court that the land in suit was ancestral was erroneous, and that the evidence on the record clearly showed that it was non-ancestral.

When the case came up for hearing before us, Mr. Bashir Ahmad himself argued, successfully, that the finding of the lower Court ^h was wrong. We dealt with this matter at length in our order of 13th December 1940, and after discussing the evidence produced by the parties came to the conclusion that the land had not been proved to be ancestral and, therefore, the plaintiffs' suit was not governed by the Punjab (Custom) Limitation Act of 1920 and that Art. 141, Limitation Act applied, under which the suit was within time. It was on the basis of these findings, that the question of succession according to the custom prevailing in this tribe arose. It will thus be seen that the

18. (41) 28 AIR 1941 P C 21 : 193 I C 436 : I L R (1941) Lah 154 : I L R (1941) Kar P C 22 (P C), *Mt. Subhani v. Nawab*.

19. (36) 23 A I R 1936 Lah 403 : 164 I C 796 : 38 P L R 807, *Gulab v. Umar Bibi*.

plaintiffs' case throughout had been that the land was non-ancestral and it was found to be so by this Court. In these circumstances, if we were to allow the plaint to be amended at this stage, it will be introducing an entirely inconsistent case to what the plaintiffs had alleged in the beginning and to which they had stuck and (successfully) right up to the reference to the Full Bench. It is hardly necessary to say that such a prayer cannot be granted under O. 6, R. 17, Civil P. C. Further, if the plaint were allowed to be amended it will necessitate a remand virtually resulting in a re-trial of the whole suit. A remand under O. 41, R. 25 cannot be made as it is not a case in which the Court had omitted to frame or try a material issue arising on the pleadings. As has been stated above, an issue as to the ancestral character of the land had actually been framed, evidence led and a finding recorded. Nor does O. 41, R. 27, Civil P. C., apply for no evidence which the plaintiffs offered to lead in the lower Court was erroneously excluded by that Court nor is it a case in which this Court after examining the record has found an inherent lacuna for supplying which additional evidence might be necessary. Mr. Bashir Ahmad referred to the inherent powers of this Court under s. 151, Civil P. C., but obviously, those powers cannot be invoked in a case of this kind. In these circumstances we are unable to grant the prayer for amendment of the plaint, or to remand the case for further inquiry as to the ancestral nature of the land. On the question of custom the finding of the lower Court on issue 5 cannot be sustained in view of the decision of the Privy Council and the large number of judicial and other instances on the record showing that the daughters have a preferential right to succeed to non-ancestral property as against collaterals of the tenth degree. The appeal fails and is dismissed, but in the circumstances the parties are left to bear their own costs throughout.

G.N./R.K.

Appeal dismissed.

(29) A. I. R. 1942 Lahore 6

TEK CHAND AND BECKETT JJ.

Kesar Chand and another

v.

Uttam Chand and others.

First Appeal No. 419 of 1939, Decided on 16th May 1941, from decree of Sub-Judge, First Class, Montgomery, D/- 30th May 1939.

(a) Deed — Construction — Surety bond — Moveable and immovable properties charged— Details of moveables sufficient to identify them not given—Bond held created personal liability with charge upon specific immovable property.

The guardian of the minor judgment-debtors against whom a mortgage decree had been passed appealed to the High Court against the mortgage decree and applied for stay of the sale. On being called upon to furnish security the guardian executed the following surety bond : "I hereby stand as surety for minors, judgment-debtors, and agree that in the event of the appellate Court's decision being against the judgment-debtors, my moveable and immovable properties detailed hereinafter shall be liable for making good the deficiency, if the sale-proceeds of the hypothecated property are not sufficient to meet the demand, i. e., the amount which may then be found due from judgment-debtors according to the decision." Though the immovable properties were specified no such description was given of the moveable property as would enable it to be satisfactorily identified, should execution become necessary. The moveable property comprised ornaments, clothes and animals, of which an approximate valuation was furnished, but of which no further details were given :

Held that the bond contained an undertaking of personal liability combined with a charge upon specific immovable property. The fact that the surety merely stated in the bond that the High Court had called upon him to file a security bond whereby he was to become liable to make good any deficiency, without further qualification clearly indicated that a personal liability was to be added over and above the charge upon specific immovable property : ('19) 6 A I R 1919 P C 55, *Disting.* [P 9 a,c]

Held further that even if it was to be supposed that the surety was intending to comply with the spirit of the High Court order, his bond would have included an undertaking of personal liability in view of the form of security bond in Appendix G, Civil P. C. [P 9c]

(b) Hindu law—Alienation—Father — Mortgage of joint family property — Suit by son alleging mortgage as void for want of coparceners' consent—Plaintiff cannot contend that no personal liability arose — Personal liability accepted and enforced — Sale cannot be set aside merely because invalid mortgage was pleaded in first instance.

Where the plaintiff's (son's) suit is based on the contention that the supposed mortgage of the joint family property by his father was entirely void, as made without the consent of the coparceners and without sufficient justification, he cannot contend at the same time that no personal liability arose, the original security being entirely worthless. When a personal liability has been accepted and enforced the sale of property cannot be set aside merely because an invalid mortgage was put forward in the first instance. [P 9c, f]

(c) Execution — Appeal against decree — Security bond—Executing Court must carefully scrutinise form of security bond before accepting it — Personal liability if intended should be clearly mentioned — Security bond charging immovable property should not be made in favour of Court but in favour of actual person such as Court's officer or one of parties.

Where in the case of an appeal against the decree sought to be executed, a security bond is executed the executing Court must carefully scrutinise the form of the security bond used before accepting it and where personal liability is intended it should be clearly specified so as to avoid further litigations arising from an ambiguity thereof. A legal mortgage cannot be created in favour of the Court since the Court is not ordinarily a juristic person capable of acquiring an interest in the immovable property or of making a valid assignment. Consequently, the security bond creating a charge on immovable property should not be executed in favour of the Court but either in favour of some actual person such as an officer of the Court or one of the parties: ('19) 6 A I R 1919 P C 55, *Foll.* [P 9g; 10a]

M. C. Mahajan, Shambu Lal Puri and M. L. Puri — for Appellants.

5 *J. N. Aggarwal and Narotam Singh; and Girdhari Lal* — for Respondents 2 and 3, respectively.

Beckett J. — Nand Lal, defendant 2, obtained a preliminary mortgage decree against certain property belonging to the minor nephews of Uttam Chand, defendant 1, who was acting as guardian in the suit. There was an appeal against this decree and an application for stay of sale, a final decree having been passed in the meantime. The application for stay of sale was resisted by counsel for the opposite party, who asked that his client might in any case be secured by a charge upon immovable property against loss if the sale was stayed. The following order was thereupon passed by the Judge hearing the application on 11th May 1928:

I think that this is a reasonable argument and having in view all the circumstances I order that the property be not sold if the petitioners can furnish security in the form of a charge upon immovable property to the satisfaction of the executing Court for paying to the decree-holder in the event of the failure of their appeal, the amount by which the price fetched by the mortgaged property when sold under the decree falls short of the amount then found due to the decree-holder under the provisions of the final decree. The amount for which the security is to be found under this order will be such as may appear to be proper to the executing Court.

In consequence of this order Uttam Chand executed himself a security bond on 31st July 1928 in the following form:

I as next friend of the minors have preferred an appeal to the High Court of Judicature at Lahore. The High Court has called upon me to file a security bond to the effect that if the decree money and the costs, etc., are not recovered in full from the land, I will be liable to make good the deficiency. Hence, I hereby stand as surety for Hans Raj and others, minors, judgment-debtors and agree that in the event of the appellate Court's decision being against the judgment-debtors, my moveable and immovable properties detailed hereinafter shall be liable for making good the deficiency, if the sale-proceeds of the hypothecated property are not sufficient to meet the demand, i. e., the amount which

may then be found due from judgment-debtors according to the decision. I have therefore written these few words in the form of a security bond so that the same may serve as an authority.

The details of the property attached to the bond are as follows:

Details of the moveable property.

Ornaments worth about	... Rs. 4000-0-0
Silk clothes worth	... Rs. 400-0-0
She-buffaloes worth	... Rs. 800-0-0
Two cows worth	... Rs. 200-0-0

Details of the immovable property.

Two houses situate at Pakpattan valued at	Rs. 10,000-0-0
One house situate at Pakpattan valued at	Rs. 1200-0-0
One-fourth of a shop, situate in Mandi Pakpattan, valued at	Rs. 1500-0-0.

The case was eventually compromised in the High Court. A decree in the terms of the compromise was passed on 25th October 1932. A final decree was passed but interest was reduced and the judgment-debtors were given an extension of time, within which no interest was to be charged. It was further provided that the property should remain under attachment and that the security should continue. It is this provision which has given rise to the present litigation. The mortgaged property was eventually sold. The exact date is not given, but the sale took place sometime before 4th January 1934. The price fetched was only Rs. 4460-6-0, whereas the amount allowed to the decree-holder under the final decree was Rupees 12,561-3-5. The executing Court then proceeded to sell various properties belonging to Uttam Chand as follows: (1) On 14th November 1934 a piece of land was sold to the decree-holder for Rs. 3872. (2) On 24th December 1934 a house was sold to Gehla Ram, defendant 3, for Rs. 1200. (3) On 22nd January 1935 a residential site was sold to the decree-holder for Rs. 988. (4) On 22nd November 1936 a piece of land was sold to the decree-holder for Rs. 25.

Of the above properties, the second was covered by the security bond. The other three properties had not been so covered. The present suit was brought on 11th June 1938 by the sons of Uttam Chand. They alleged that they constituted a joint Hindu family with their father and that the properties in question were ancestral. The legal pleas fall under two heads. So far as the second of the properties sold is concerned, they claim that Uttam Chand had no power to create a charge on this property inasmuch as there was no antecedent debt. As regards the other properties, they say that they could not be sold in execution, since their

father had not undertaken any such personal responsibility as could constitute a debt which they were under any obligation to discharge. They accordingly ask for a declaration that the sales in question have no legal effect and they further claim a decree for possession. The suit has been brought against the original auction purchasers together with subsequent transferees. The status of Uttam Chand's sons as constituting a joint Hindu family is not now in question nor is it denied that the property is ancestral, except as regards the house bought by Gehla Ram. The main defence is that Uttam Chand had laid himself open to a personal liability on a true construction of the bond, confirmed by the nature of the subsequent proceedings. Should this defence fail, it is contended on behalf of the defendants that the general rule, which only permits joint family property to be charged in respect of an antecedent debt, does not apply to property charged under a security bond; and as to the property not covered by the bond, it is contended that this property could also be sold in execution, inasmuch as Uttam Chand had mortgaged the property included in the bond by means of a series of registered deeds and had thus impaired the value of the property offered as security.

The trial Court held that on a true construction of the security bond, it could be taken as an instrument of charge only and not as creating any personal liability. On other points, however, the findings were against the plaintiffs. It was held that Uttam Chand had laid himself open to personal liability by his dealings with the property originally secured for the benefit of Nand Lal, in which connexion it was considered significant that he had never taken any objection to the effect that he was not personally liable. With regard to the charged property, it was held that this was an exception to the rule under which such a charge could only be imposed for family necessity or enforced against the sons in respect of an antecedent debt. With regard to property not so charged it was held that this could be made available for sale in view of the principle expressed in S. 68 (1) (c), T. P. Act. The suit of the plaintiffs was accordingly dismissed, the parties being left to bear their own costs. The plaintiffs have appealed to this Court.

The first question to be decided is whether Uttam Chand was under any personal liability; for if this be found against the plaintiffs, their interest in the joint family

property could be sold in discharge of their obligation to meet their father's debts. This is the main issue and it is one which depends almost entirely on the true construction to be placed upon the security bond. At first sight there appears to be a considerable resemblance between the bond furnished by Uttam Chand and a somewhat similar bond which came before the Privy Council in 42 ALL 158.¹ The same question then arose whether the sureties should be treated as having undertaken any personal liability or as having only charged their estate. On this point, their Lordships of the Privy Council observed that it seemed probable that the estates charged had been so ample that it had hardly been worth while for the sureties to raise any objection with regard to their personal liability before; but since the point had been raised before them and had to be decided, their opinion was that the true construction of the document made it an instrument of charge only and not a bond imposing any personal liability. On behalf of the plaintiffs, it is urged that this lays down a general rule of construction which should be applied to the bond now in question. It is further urged that the bond must be taken as intended to conform with the High Court order which required only that the petitioners should furnish security in the form of a charge upon immovable property.

There is, however, one marked difference between the security bond in the present case and that considered in 42 ALL 158.¹ In the present instance, the schedule to the bond covers not only immovable property but also moveable property of which no such description is given as would enable it to be satisfactorily identified, should execution become necessary; this moveable property comprises ornaments, clothes and animals, of which an approximate valuation is furnished, but of which no further details are given. It is impossible to reconcile this with a mere attempt to comply with an order understood as being confined to a charge on immovable property alone; and the most reasonable interpretation of this order appears to be that it was made to afford some indication of the petitioner's ability to meet any further liabilities which might arise, should the charges upon specific immovable property fail. It is difficult to distinguish this from an undertaking of per-

1. (19) 6 AIR 1919 P C 55; 55 I C 550; 42 ALL 158; 46 I A 228; 22 O C 212 (P C); Raj Raghubar Singh v. Jai Indra Bahadur Singh.

^asonal liability combined with a charge upon specific immovable property and no other satisfactory explanation has been put forward. On the face of it, therefore, the bond is compatible with an intention to undertake personal liability.

^bWith regard to the argument that the bond must be read in the light of the High Court order under which it was made, this argument is not of such great weight in favour of the plaintiffs as might at first sight appear. An order with regard to the giving of security is generally expressed in a summary form and has reference to the usual procedure and the prescribed forms in which security bonds are to be taken. At the time when the security bond in the case above-mentioned was given, no forms had been prescribed, though the deficiency had been made good before the Privy Council decision was given and their Lordships expressed a hope that this would put an end to similar difficulties in future. The forms will now be found in Appx. G, Civil P. C., and the appropriate form in a case of this kind clearly provides for a personal liability should the charge fail. The order for the furnishing of security in the form of a charge on immovable property must be taken as having been made with reference to the use of some such form. Thus, if it is to be supposed that Uttam Chand was intending to comply with the spirit of the High Court order, his bond would have included an undertaking of personal liability. It is to be noted that in the recital it is merely stated that the High Court had called upon him to file a security bond whereby he was to become liable to make good any deficiency, without further qualification. This would only be so if a personal liability was to be added over and above the charge upon specific immovable property. ^cThe view that this was the intention is confirmed by the subsequent proceedings in execution. Although the trial Court in the present case has held that the executing Court would, in any case, have been entitled to act as it did by virtue of the provisions of s. 68, T. P. Act, a proposition which is possibly open to question, there does not seem to be any doubt that the executing Court acted on the assumption that Uttam Chand had undertaken a personal liability and this assumption does not appear to have been challenged at any stage of the proceedings. On the contrary, some of the pleadings presented on his behalf during the course of execution seem to contain a clear admission

that he had made himself personally liable. In these circumstances, we are of opinion ^ethat, on a true construction of the security bond, Uttam Chand had undertaken personal liability and that it is not possible at this stage to reopen the execution proceedings by holding that no such liability could be enforced. It might perhaps be argued that the executing Court should not have proceeded against the other property until the property specifically charged had been sold for what it was worth; but when the present suit is based on the contention that the supposed mortgage of the joint family property was entirely void, as made without the consent of the coparceners and without sufficient justification, it ^fis difficult to see how they can contend at the same time that no personal liability arose, the original security being entirely worthless. When a personal liability has been accepted and enforced in this way, the sale of property cannot be set aside merely because an invalid mortgage was put forward in the first instance.

This is sufficient to conclude the case so far as the parties are concerned, but some further remarks are necessary. As already mentioned, their Lordships of the Privy Council expressed a hope that the introduction of proper forms would put an end to difficulties of the kind which have arisen in the present case; but some of the cases which have been cited before us afford an indication that this hope has not been fulfilled. In the present instance, the failure of the executing Court to devote sufficient attention to the form of the security bond has led to lengthy and expensive litigation which should have been unnecessary if sufficient care had been given to a scrutiny of the form used. Careful scrutiny prior to the acceptance of security bonds is all the more necessary when they relate to charges upon specific immovable property, since it would be difficult for any Court to make absolutely certain that the person offering the security has an unfettered power of disposal over the property; and a clear provision for personal liability is required to balance the risk that he may turn out to have no such power of disposal. If the mere provision of appropriate forms is not sufficient to attract the attention of subordinate Courts to the need for a clear provision to this effect, and it appears not to be sufficient, then some other steps should be taken to draw their attention to the proper procedure. ^g

There is one other point. As pointed out by their Lordships of the Privy Council in

42 ALL 158¹ a legal mortgage cannot be created in favour of the Court since the Court is not ordinarily a juristic person capable of acquiring an interest in the immovable property or of making a valid assignment. In spite of these observations the subordinate Courts continue to accept mortgages which purport to be made in their favour and this leads to further difficulties of procedure. The correct course, as indicated in the case mentioned, is to have a charge created either in favour of some actual person such as an officer of the Court or one of the parties. The forms now prescribed do not indicate in whose favour the charge is to be created, presumably because it was considered desirable to allow for differences of local practice which existed previously. In order to avoid further difficulties on this point, it also seems desirable that the Courts should be given some indication as to the person in whose favour the charge should be created. So far as the present case is concerned, I would dismiss the appeal and confirm the decree of the trial Court dismissing the suit, but, in view of the fact, that the dispute between the parties is largely due to the negligence of the executing Court in respect of the matters just mentioned I would leave the parties to bear their own costs throughout. The cross-objections would consequently be dismissed.

Tek Chand J. — I agree.

G.N./R.K. *Appeal dismissed.*

(29) A. I. R. 1942 Lahore 10

YOUNG C. J. AND SALE J.

Kailash Picture Palace Ltd., in voluntary liquidation — Appellant

v.

Kidar Nath and another, Proprietors of firm, Kidar Nath & Sons —

Respondents.

Letters Patent Appeal No. 171 of 1940, Decided on 1st July 1941, against judgment of Monroe J., in C. O. No. 73 of 1940, D/- 8th July 1940.

Company—Costs—Company in liquidation — Action by or against — Successful litigant is entitled to his costs in full in priority over other ordinary creditors — Other creditors in same position—Both will rank *pari passu* — Liquidator can show that immediate payment is not possible.

A successful litigant against a company in liquidation is entitled to be paid his costs in full in priority over other ordinary creditors except where there are other creditors in the same position as himself when they both will rank *pari passu* as regards the fund available for the discharge of their

debts : (1884) 27 Ch D 33 ; (1869) L R 8 Eq 94 and (1895) 1 Ch D 758, *Rel. on.* [P 11c] e

It is, however, open to the liquidator to show that the condition of the assets of the company was such that immediate payment cannot be made : (1895) 1 Ch D 758 and ('29) 15 A I R 1928 Bom 252, *Rel. on.* [P 11b]

V. N. Sethi — for Appellant.

Tek Chand — for Respondents.

Young C. J. — This is a Letters Patent Appeal against the decision of the learned company Judge sitting in Chambers. When the learned Judge passed his order of 8th July 1940 the company was in voluntary liquidation. Subsequent to this order, however, on a petition by the respondent creditor in this case, the learned Company Judge has ordered that the liquidation should be under the supervision of the Court. The material fact is that the respondent was successful in litigation against the company in liquidation. The respondent was the plaintiff and he commenced the action before liquidation. The action was proceeded with after liquidation and an order giving the respondent costs was thus made after liquidation. The question argued in the Court below was whether under these circumstances the decree-holder, i. e., the respondent here, should have his costs paid in full in priority to the claims of the other creditors in the liquidation. The learned Judge held, relying on certain English authorities, that the costs of the successful litigant are payable immediately and in full. Against this decision, the liquidator has appealed to this Court. The leading case is (1884) 27 Ch D 33.¹ Pearson J., says at page 38 :

Now I consider that to be a positive decision of the Lord Chancellor, that when the company is ordered to pay the costs, those costs are not to be paid *pari passu* with the other creditors, but are to be paid forthwith, and that the successful litigant is to be put in the same position as if he had got judgment at law and had been allowed to issue execution.

The learned Judge then proceeds to quote James L. J., in (1869) L R 8 Eq 94² at p. 97. The learned Lord Justice has observed as follows :

Upon general principles, unless the Court is bound by some express enactment or order to the contrary, it appears to me that a company in winding up ought to be dealt with as a matter of course like any other litigant and if an action be brought or resisted for the benefit of the estate, and that action be brought fruitlessly or defended fruitlessly, then the estate, that is to say, the other cre-

1. (1884) 27 Ch D 33 : 53 L J Ch 702 : 50 L T 518 : 33 W R 9, In re Dominion of Canada Plumbago Company.
2. (1869) L R 8 Eq 94 : 38 L J Ch 485 : 20 L T 301 : 17 W R 1079, Bailey and Leatham's case.

^a ditors, ought, like everybody else, to be fixed with the costs to which they have improperly and unnecessarily put their opponent.

The liquidator represents the estate and therefore the creditors, and where the liquidator acting for the estate and the creditors brings a fruitless action, or resists an action fruitlessly, it is only right that the successful litigant should have priority for his costs over the creditors whom the liquidator represents. This authority has been followed by Vaughan Williams J., in (1895) 1 Ch D 758.³ The learned Judge, however, points out that although there is priority as against the general body of creditors it is possible that other persons may have either priority over the successful litigant in a particular case or may be entitled to rank *pari passu* with the successful litigant. It is possible also that the liquidator might be able to show that the condition of the assets of the company was such that immediate payment could not be made. In A I R 1928 Bom 252⁴ at page 259 the then learned Chief Justice of the Bombay High Court points out, following the decision of Vaughan Williams J., in (1895) 1 Ch D 758,³ the conditions in which the liquidator may escape immediate payment. The general position appears therefore to be clear : A successful litigant against a company in liquidation is entitled to be paid his costs in full in priority over other ordinary creditors except where there are other creditors in the same position as himself when they and he will rank *pari passu* as regards the fund available for the discharge of their debts.

^a The learned counsel for the liquidator here has asked for time to pay the costs in this case. Counsel for the respondent has agreed to give time. The question of what time will be allowed, will be a matter for the Company Judge, now that the liquidation is under the supervision of the Court. The respondent will have his costs of this appeal.

G.N./R.K.

Appeal dismissed.

3. (1895) 1 Ch D 758 : 72 L T 241 : 43 W R 476, In re London Metallurgical Company.

4. ('28) 15 A I R 1928 Bom 252 : 110 I C 33 : 52 Bom 477 : 30 Bom L R 549, Maneklal Mansukhbhai v. Suryapur Mills Co., Ltd.

(29) A. I. R. 1942 Lahore 11

SALE J.

Municipal Committee, Jalalpur Jattan
— Defendant — Appellant

v.

Suraj Parkash — Plaintiff —

Respondent.

Second Appeal No. 1576 of 1940, Decided on 13th May 1941, from decree of Senior Sub Judge, Gujrat, D/- 2nd August 1940.

(a) Punjab Municipal Act (3 of 1911), S. 61 — Octroi leviable on goods imported within municipal area—Transmission of parcels from factory outside municipal limits to post office within municipal limits amounts to 'importation.' ^f

Where the octroi is leviable by the municipality on all goods imported within the municipal area, the transmission of parcels from a factory situate outside the municipal limits to the post office within the municipal limits for despatch to various destinations amounts to 'importation' and therefore an octroi duty is leviable : 22 Bom 843, *Rel. on*; ('36) 23 AIR 1936 All 83, *Disting.* [P 13e]

(b) Punjab Municipal Act (3 of 1911), S. 86— Court concluding that it had jurisdiction as Municipal Committee's act in imposing tax was ultra vires — Plaintiff is not entitled to injunction as matter of course — There must be finding that imposition of tax was in fact ultra vires.

^g Where the civil Court comes to the conclusion that it has jurisdiction to entertain the suit on the ground that the Municipal Committee's act in imposing the tax was illegal, arbitrary and ultra vires, the plaintiff is not entitled to the injunction as a matter of course, in the absence of a finding that the imposition of the tax by the committee was in fact illegal, arbitrary and ultra vires. [P 12e,f]

(c) Punjab Municipal Act (3 of 1911), S. 61— Plaintiff escaping levy of octroi for some years — Later, in consequence of dispute with municipal committee executive officer of committee agreeing to accept plaintiff's goods in transit through municipal limits on payment of 2 annas per trip—Arrangement held provisional — Subsequent demand for full octroi duty held not illegal or ultra vires — No question of estoppel ^h held could arise against committee.

The plaintiff had escaped the levy of octroi by devious methods during some years past and later as a result of a dispute with the municipal committee, came to terms with the executive officer of the committee or some other subordinate, who without apparent authority, agreed to accept the goods of the plaintiff in transit through the municipal limits on payment of 2 annas only per trip (irrespective of the number of the parcels despatched). It was therefore contended that the committee was acting ultra vires in demanding full octroi duty subsequently and was estopped from doing so :

Held that even if the arrangement with the executive officer of the municipality had any sanction it was merely a provisional arrangement to enable the committee to recover some money pending the decision of the Local Government to whom the dispute was referred and since it was in consequence

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a of an order from the Local Government as a result of which octroi duty was leviable in the ordinary way, that the committee had proceeded to make a demand for full octroi duty on the plaintiff, there was nothing illegal, arbitrary or ultra vires in the action of the committee. [P 13a]

Held further that in the circumstances no question of estoppel arose against the municipal committee. [P 13h]

(d) Punjab Municipal Act (3 of 1911), S. 86—Levy of tax by municipality not in excess or in contravention of statutory powers—Suit for injunction does not lie.

b Where the demand made by the municipal committee for the levy of tax is not in excess or in contravention of the powers conferred on it by statute and the committee has clearly been acting within its statutory powers, a suit for an injunction is not maintainable: ('40) 27 A I R 1940 Lah 377 (F B), *Rel. on.* [P 14b,c]

(e) Punjab Municipal Act (3 of 1911), S. 84—Method of assessment wrong—Aggrieved party must resort to statutory remedy.

The act of a municipal committee in adopting a wrong method of assessment merely amounts to an erroneous exercise of jurisdiction and the aggrieved party must seek his remedy from the forum provided in the statute. The civil Court has no jurisdiction. [P 14d]

Ghulam Mohy-ud-Din — for Appellant.

Shamair Chand — for Respondent.

c **Judgment.**—The plaintiff in this case is the managing director of a concern known as Tan Sen House, Jalalpur Jattan. At the material time this concern had a factory situated outside the territorial jurisdiction of the Municipal Committee of Jalalpur Jattan. It is common ground that there is in force in Jalalpur Jattan an octroi which is a tax leviable on any goods imported into the municipality. It appears that the plaintiff used to take parcels from his factory to the post office at Jalalpur Jattan for despatch by post and this suit arises out of a demand made by the Municipal Committee of Jalalpur Jattan for octroi in respect of a such parcels. It seems that the committee made a demand upon the plaintiff for the payment of octroi amounting to Rs. 775 for a certain period during the year 1936-37 and had taken steps to enforce its demand by action under S. 81, Municipal Act. Thereupon the plaintiff instituted this suit for a permanent injunction to restrain the defendant from levying the tax. The trial Court framed the following issues:

(1) Whether this Court has jurisdiction to hear the present suit? (2) Whether the demand of the defendant with regard to the octroi tax is ultra vires, illegal and arbitrary? (3) Whether the defendant is barred from demanding the tax by virtue of its own acts? (4) Whether the plaintiff is liable to the sum of Rs. 775-1-8 on account of octroi?

The learned Subordinate Judge considered the first three issues inter-connected and having held that the demand of the defendant committee in respect of the tax was ultra vires, illegal and arbitrary, proceeded to find that the plaintiff was not liable to pay octroi and decreed his suit for an injunction. The learned Senior Subordinate Judge in a brief judgment, which is not easy to follow, dismissed the committee's appeal and maintained the trial Court's decision. It would seem that having come to the conclusion that a civil Court had jurisdiction to entertain the suit on the ground that the committee's act in imposing the tax was illegal, arbitrary and ultra vires, he f considered that it would follow as a matter of course that the plaintiff is entitled to the injunction. It is not clear, however, on what grounds the learned Senior Subordinate Judge has found that the imposition of the tax by the committee was in fact illegal, arbitrary and ultra vires. The Senior Subordinate Judge appears to have overlooked the fact, which has throughout been common ground and is admitted before me, that there is in force in Jalalpur Jattan an octroi leviable on all goods imported within the municipal area. It is further common ground that the plaintiff in this case during g the material period sent parcels from his factory outside the municipal limits into the post office at Jalalpur Jattan, which is within municipal limits, for transmission to destinations in different parts of the Punjab. The short question for consideration is whether the transmission of parcels from the factory to the post office within municipal limits, amounts to "importation." This is not the point of view from which the learned Senior Subordinate Judge has viewed the case. He seems to have thought that because from about 1932 to 1936 the plaintiff escaped the levy of octroi by devious methods, and h later as a result of a dispute with the committee, came to terms with the executive officer of the committee or some other subordinate, who without apparent authority, agreed to accept the goods of the plaintiff in transit through the municipal limits, for despatch from the local post office, on payment of annas two only per trip (irrespective of the number of the parcels despatched), therefore, the committee for some reason was acting ultra vires in demanding full octroi duty. The learned Senior Subordinate Judge has overlooked the fact that even assuming for the sake of argument—which is very doubtful—that this arrangement with

the executive officer of the municipality had any sanction it was merely a provisional arrangement to enable the committee to recover some money pending the decision of the Local Government to whom the dispute was referred and it was as a result of an order from the Local Government that octroi duty was leviable in the ordinary way that the committee proceeded to make a demand on the plaintiff.

In these circumstances it is difficult to see what there is illegal, arbitrary or ultra vires in the action of the committee. The learned Subordinate Judge, who tried the case, came to the conclusion that an arrangement whereby parcels were sent to the Jalalpur Jattan post office for despatch to other places, was not "importation" within the meaning of the word applicable to the levy of octroi. He referred to a decision of a Single Judge of the Allahabad High Court sitting in Criminal Bench, A I R 1936 ALL 83,¹ who held that the action of an accused person in causing carts to pass through the limits of the municipality without resting there, did not amount to importing goods into the municipality. The ratio decidendi of this ruling was that the words "bring" and "import" as used in the notification applicable to that particular case, contained an element of "pause" and "repose." Incidentally this authority concerns a case of terminal tax and not octroi duty. It is difficult to see how this ruling helps the plaintiff's case. Here the plaintiff was bringing parcels of sweets into the post office at Jalalpur Jattan and leaving them at the post office for despatch. Certainly, there was an element of pause and repose in this procedure assuming that we have to look for such an element which I venture to doubt. On the other hand, it has been held by a Division Bench of the Bombay High Court in 22 Bom 843,² in a case relating to the levy of octroi duty, that goods passing through a certain municipal district in the course of transit to Bombay are "imported" within the ordinary acceptance of the word. The learned Judges pointed out that since the goods passed within the limits of the municipality, they were imported, that is, brought within those limits from a place without its boundaries and that the only remedy of the applicant, if he exported them, was to claim a refund. I agree with this decision. It seems to me perfectly clear that in taking parcels

from his factory which is outside municipal limits, into the Jalalpur Jattan post office, which is within the municipal limits of Jalalpur Jattan, the plaintiff was in fact importing the articles and was therefore liable to the octroi duty which admittedly the municipality had authority to impose.

It was urged before me both by Mr. Shamair Chand, and by the respondent himself at length in amplification of his counsel's arguments, that the committee was estopped from demanding this tax. The basis of this argument is that for a number of years before 1936 the plaintiff in order to avoid liability for octroi, used to take his goods for despatch to the post office at Gujrat (which happens to be outside municipal limits) instead of the post office at Jalalpur Jattan. This arrangement, however, proved inconvenient as the post office at Gujrat was some 15 miles away. Plaintiff-respondent therefore came to some arrangement with a subordinate of the municipal committee by which instead of paying octroi duty, he paid a fee of annas two per journey irrespective of the number of parcels taken. The plaintiff calls this arrangement "the transit parcel system" whatever this expression may mean. It is urged that because the committee—so plaintiff says—recognized this arrangement, the plaintiff abstained from continuing to despatch his goods from Gujrat post office and brought them to Jalalpur Jattan and the committee is therefore estopped from levying the tax. There is nothing on the record to show what "the transit parcel system" is, nor was any issue framed as to its applicability to the facts of the present case. So far as I can judge, the arrangement appears to have been unauthorised. There is no evidence that it was ever sanctioned by the municipal committee and it appears to have been disapproved by the auditors and by Government. On the other hand, the plaintiff discontinued the use of the Gujrat post office to suit his own convenience; as already mentioned, the arrangement, such as it was, was provisional pending a reference to Government. In the circumstances it is difficult to see how the principle of estoppel applies nor can counsel for the respondent cite any authority to show that in such circumstances the committee is barred from demanding octroi. I reject this contention. The circumstances under which a civil suit is maintainable for an injunction against a municipal committee to challenge taxation or assessment, has been recently authoritatively decided by a Full Bench of this Court

1. (1936) 23 A I R 1936 ALL 83 : 160 I C 862 : 37

Or L J 335, *Nek Mohammad v. Emperor*.

2. (1936) 22 Bom 843, *In re Rahimu Bhavji*.

in 21 Lah 707.³ On p. 742 of this ruling, Tek Chand J. observed as follows :

A municipal committee is a creature of the statute. It is brought into existence by, or under the authority of, an express legislative enactment to have control over municipal affairs within defined local limits and can exercise such powers of legislation, taxation and regulations as are entrusted to it by the Legislature. If, in the exercise of these powers the committee makes a mistake, it will merely be a case of erroneous exercise of jurisdiction, and the aggrieved party must seek his remedy in the manner, and from the forum, provided in the statute. If however its action is in excess of, or in contravention of, the powers conferred on it by the statute, the subject has his ordinary remedy to seek relief in the civil Courts, unless their cognisance is either expressly or impliedly barred (S. 9, Civil P. C.). This rule has been applied in numerous cases relating to imposition or assessment of taxes by municipal committees. When a suit is brought to challenge such taxation or assessment, the civil Court has first to decide whether the committee has acted within, or in exercise of, its statutory powers. If it finds that the committee acted within its powers, the suit must be dismissed forthwith. If however the taxation or assessment is ultra vires, the Court must adjudicate on the merits and grant relief accordingly.

It is apparent in the present case that the demand made by the municipal committee for the levy of octroi, was not in excess or in contravention of the powers conferred on it by statute. The committee has clearly been acting within its statutory powers. Accordingly this suit for an injunction is not maintainable and should have been dismissed. One of the arguments addressed to me by Mr. Shamair Chand and his client was that the method of assessment by which the committee has reached the figure of Rs. 775 as the amount due from the plaintiff as octroi is wrong because octroi should, it is contended, be levied on the value, whereas the committee is said to have levied it on the weight of the parcels. This, in my view, is not a matter into which a civil Court has in the circumstances of this case power to enquire. If the committee has made a mistake (and I express no opinion on this point) it would be, as pointed out by Tek Chand J., "merely a case of erroneous exercise of jurisdiction and the aggrieved party must seek his remedy from the forum provided in the statute." This remedy is provided in s. 84, Municipal Act, which provides for an appeal against the assessment or levy of any tax or against the refusal to refund any tax. For these reasons I expressly avoid coming to any decision on issue 4 in this case, viz., whether the plaintiff is liable to the sum of

Rs. 775-1-3 on account of octroi tax, which in my view, does not arise in this suit. With these observations I accept the appeal, set aside the decision of the Court below, and dismiss the plaintiff's suit with costs throughout.

G.N./R.K.

Appeal accepted.

(29) A. I. R. 1942 Lahore 14

TEK CHAND AND BLACKER JJ.

Raju — Decree-holder — Appellant

v.

Mangla — Judgment-debtor — Respondent.

Exn. First Appeal No. 200 of 1940, Decided on 9th June 1941, from order of Sub-Judge, 1st Class, Hissar at Sirsa, D/- 8th May 1940.

Punjab Alienation of Land Act (13 of 1900, as amended by Act 10 of 1938), Ss. 16, 4(1) and 4 Proviso — Mortgage decree passed — Mortgagor subsequently declared agriculturist under S. 4(1)—Decree can be executed — Scope of S. 4 Proviso.

A mortgage decree can be executed against the mortgagor even if after the passing of the decree he is declared to be an agriculturist under S. (4) (1) because at the time of his becoming a notified agriculturist he could not be said to be the absolute owner of the land within the meaning of S. 16, his estate in it being limited by the charge which had already been lawfully created, and the mere fact that his own personal status was subsequently altered cannot attract the provisions of S. 16 to that land, and also because such a mortgage decree is expressly saved by the proviso to S. 4 which saves decrees passed before the notification under S. 4(1). The proviso to S. 4 cannot be construed as a proviso only to S. 4(1) and (2) and as saving only those decrees which declared a person to be an agriculturist or a non-agriculturist : ('40) 27 A I R 1940 Lah 370 (FB), *Rel on.* [P 15f,g,h; P 16a]

J. N. Aggarwal and Bhagirath Das —
for Appellant.

Achhru Ram and N. C. Pandit —
for Respondent.

Blacker J.—On 30th July 1929 the respondent Mangla executed a mortgage of land in village Ratta Khera in the Sirsa Tehsil of the Hissar District in favour of Raju, the appellant, in consideration of a sum of Rs. 9000, which was to bear interest at 12 per cent. He was then describing himself as a Suthar Kulehra. On 9th April 1936 Raju sued to recover the money due by the sale of the mortgaged land. Mangla raised the plea that he was a Bhatti Rajput and therefore an agriculturist. This plea, however, failed and on 14th April 1937 the Court passed a preliminary decree against him which was confirmed by the High Court on 27th October 1938. On 15th December 1938 a

3. ('40) 27 A I R 1940 Lah 377; 191 I C 65 : I L R (1940) 21 Lah 707; 42 P L R 573 (FB), Municipal Committee, Montgomery v. Sant Singh.

a notification was issued by the Government under s. 4, Punjab Alienation of Land Act, declaring Bagri Suthars to be a notified agricultural tribe in the Hissar District. On 15th March 1939, the final decree ordering the sale of the land was passed by the trial Court and the decree-holder then sued for execution of this decree by sale of the land. On notice being issued to the judgment-debtor on 5th June 1939, he objected to the sale on the ground that he was a bagri suthar and, therefore, a member of a notified agricultural tribe and that the land could not be sold. The learned executing Court held in his favour that he was a bagri suthar and also held that the prohibition under s. 16, Punjab Alienation of Land Act, was absolute and that in spite of the existence of the decree of the trial Court, behind which the learned Subordinate Judge conceded that he could not ordinarily have gone, he was bound to refuse to proceed to sell the land.

The present appeal is an appeal by the decree-holder against this order. The finding that the respondent was a bagri suthar has been contested in appeal, but I think that the decision of the learned lower Court was right on this point. Exhibits J. D. 1 and J. D. 2 appear to me to be reliable documents as they go back to 1892 and were compiled at a time when it could not possibly be foreseen that bagri suthars were going to be notified as an agricultural tribe some 60 years later. These documents appear to me to be sufficient evidence to justify the learned lower Court's finding that the respondent was in fact a bagri suthar and that therefore he is now by virtue of the notification of 15th December 1938 a statutory agriculturist.

a The main point, however, on which this appeal turns is the legal point. Admittedly, although the respondent became an agriculturist on 15th December 1938, it cannot be held that that notification was, in any way, retrospective and he must be deemed to have been a non-agriculturist at the time when the mortgage decree was passed against him declaring the land liable to sale. At that time it was a perfectly valid decree against a non-agriculturist and the main point for decision in this case is whether the subsequent notification could operate so as to deprive the decree-holder of the rights that had accrued to him by virtue of the decree of the trial Court. Counsel for the appellant relied upon a very recent Full Bench decision of this Court reported as I L R (1941) Lah

1.¹ The facts of that case were not absolutely identical but were extremely close. In that case the mortgagor and the original mortgagee were both non-agriculturists. The mortgagor, however, had transferred his rights in the land to an agriculturist and although on the footing of the mortgage the original mortgagee had obtained a decree for the sale of the land, the trial Court had made this decree subject to the reservation that with regard to the land which was in the hands of the agriculturist, it could not be sold but could only be proceeded with by way of mustajri. The Full Bench held that in view of the avowed intention of the Legislature in enacting the Punjab Alienation of Land Act, s. 16 could not be so interpreted as to cover land which at the time that it was acquired by an agriculturist was acquired by him subject to encumbrances which limited his estate in it. In such a case the Full Bench held that the land could not be said to 'belong to' the agriculturist within the meaning of s. 16. Exactly, the same principles appear to me to apply in the present case and I consider that we must, therefore, follow that decision. At the time that the respondent became a notified agriculturist he was not the absolute owner of the land within the meaning of s. 16, but his estate in it was limited by the charge which had already been lawfully created. The mere fact that his own personal status was subsequently altered could not attract the provisions of s. 16 to that land, for the reasons given by the Full Bench in I L R (1941) Lah 1.¹

In that case the Full Bench argued on general principles that it could not have been the intention of the Legislature that s. 16 should operate so as to enable an agriculturist to acquire an estate in encumbered land and get rid of the encumbrance merely because he was an agriculturist. In the present case the question is even less open to doubt as the Legislature appears to me to have clearly expressed its intention that such an encumbrance, when affirmed as in this case by a Court, should not be affected by a subsequent change in the status of the mortgagor himself. It is only necessary to refer to the proviso to s. 4, Punjab Alienation of Land Act. It was under sub-s. (1) of that section that the Government notified Bagri Suthars as an agricultural tribe, and the proviso expressly saves the present decree from the operation

1. (40) 27 A I R 1940 Lah 370 : 191 I C 10 : I L R (1941) Lah 1 : 42 P L R 669 (F B), Punjab National Bank Ltd. Ferozepore City v. Ram Karan Ramjilal.

^a of that notification. In other words, the respondent is not to be deemed an agriculturist for the purposes of this decree.

Mr. Achhru Ram for the respondent attempted to argue first that the proviso is only a proviso to the two new sub-sections and secondly, that the decrees saved were only those decrees which specifically declared a person to be an agriculturist, or a non-agriculturist, as the case might be. There is no force in either argument. The language is unambiguous and there is no reason to think that the Legislature had any other intention than to prevent such inequitable results of a notification under that section, ^b as might otherwise ensue in a case like the present. I am of opinion, therefore, that the Court below has wrongly held that it is barred by s. 16, Punjab Alienation of Land Act, from selling the land, and I would accept this appeal with costs and direct the Court below to proceed with the application for execution according to law.

Tek Chand J. — I agree.

G.N./R.K.

Appeal accepted.

(29) A. I. R. 1942 Lahore 16

TEK CHAND AND BECKETT JJ.

^c *Nura — Defendant 1 — Appellant*
v.

*Baqar Khan, Plaintiff and another,
Defendant 2 — Respondents.*

Second Appeal No. 1489 of 1940, Decided on 16th July 1941, from decree of the Senior Sub-Judge, Lyallpur, D/- 19th July 1940.

Punjab Debtors' Protection Act (2 of 1936), Ss. 12 and 2—S. 12 modifies S. 118, Negotiable Instruments Act but leaves S. 43 of that Act intact — Pronote — "Holder in due course", money lender as defined in Punjab Act — He can recover from maker of pronote without proving execution or consideration.

^d So far as promissory notes are concerned S. 12 modifies S. 118, Negotiable Instruments Act, which can only apply when some question of consideration arises and is relevant to the case. If it is not necessary to prove the passing of consideration, no question relating to the burden of proof can arise. But the Punjab Debtors' Protection Act has left untouched S. 43, Negotiable Instruments Act, and therefore, a "holder in due course" of a promissory note, even though he be a money-lender as defined in the Punjab Act, is entitled to recover from the maker of the note, without being under any obligation to prove that the promissory note had been executed by the maker in favour of the original obligee for valuable consideration : 7 All 490 (FB), *Approved*. [P 18e,g]

Kedar Nath Chopra — for Appellant.

Abdul Aziz — for Respondent (Plaintiff).

ORDER OF REFERENCE

Tek Chand J. — On 15th March 1936 Nura Bloch (defendant 1) executed a promissory

note for Rs. 800 in favour of Ram Lal (defendant 2), carrying interest at one per cent. per mensem. Nura is illiterate and he thumb-marked the promissory note at the time of the execution. Ram Lal is admittedly a money-lender, as defined in the Debtors' Protection Act, 2 of 1936. On 5th March 1939 Ram Lal assigned the promissory note to Baqar Khan (plaintiff) for valuable consideration making an endorsement to this effect on the back of the note. On 11th March 1939, the assignee Baqar Khan, instituted a suit against Nura and Ram Lal for recovery of Rs. 800. Nura denied the execution of the note and pleaded that he had not received any consideration for it from Ram Lal. Ram Lal alleged that he had paid Rs. 800 to Nura and that he had assigned the note to the plaintiff on receipt of Rs. 400.

The trial Judge found the execution of the promissory note by Nura proved but held that the passing of consideration by Ram Lal to him had not been established. He accordingly dismissed the suit against Nura, but passed a decree for Rs. 400 in favour of Baqar Khan against Ram Lal. On appeal by Baqar Khan, the learned Senior Subordinate Judge agreed with the trial Court that the execution of the note by Nura ^g in favour of Ram Lal had been proved. He did not record a definite finding as to whether consideration passed from Ram Lal to Nura (though he was inclined to agree with the trial Court on the point) for he was of opinion that even if the promissory note was without consideration, the plaintiff, as the assignee of the note, was a "holder in due course," who had paid consideration to his assignor (Ram Lal) and therefore he was entitled to recover the amount due on the instrument not only from his transferor but also "from any prior party thereto," as laid down in s. 43, Negotiable Instruments Act. ^h He accordingly accepted Baqar Khan's appeal and granted him a decree for Rs. 800 against Nura. Nura has come in second appeal and it has been contended on his behalf that S. 43 is not applicable to the case, in view of the provisions of S. 12, Debtors' Protection Act. Section 9, Negotiable Instruments Act, defines a "holder in due course" as any person who, for consideration, became "the possessor of a promissory note, bill of exchange, cheque . . ." Section 43 lays down (inter alia) that if a party to a negotiable instrument has

transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from

him, may recover the amount due on such instrument from the transferor for consideration, or any prior party thereto.

It is conceded by counsel for the appellant that, if the provisions of the Negotiable Instruments Act have not been abrogated in the Punjab by local legislation in so far as they relate to transactions of this kind, the decision of the lower appellate Court is correct. He has pointed out however that s. 2 (6) (vi), Debtors' Protection Act, defines a "loan" as including a promissory note, and in s. 2 (7) "money-lender" is defined as including, inter alia, a successor-in-interest by assignment of the person who had advanced the loan. He urges therefore that as Ram Lal, the original obligee under the promissory note, is a money-lender, his assignee Baqar Khan must also be held to be a "money-lender" for the purposes of this case. In s. 12 it is laid down that:

Notwithstanding anything to the contrary contained in any other enactment for the time being in force, the burden of proving that any consideration alleged to have been paid by a money-lender actually passed shall be on him; unless the consideration is acknowledged by a debtor in his own handwriting or has been endorsed by the registering officer . . . as having been paid in his presence.

The appellant contends that s. 12 of this Act overrides not only s. 118, Negotiable Instruments Act, but also s. 43 of that Act. On the other hand, it is maintained by counsel for the respondent that s. 12 only regulates the incidence of onus as to the passing of the consideration as between the maker of the promissory note and the original obligee, and that it does not affect the principle of negotiability of the note or the rights of a "holder in due course" for value against his transferor or any prior party thereto (including the maker) as laid down in s. 43 of the Act. This contention has been accepted by the learned Senior Subordinate Judge who has held that the assignee of the note, being a "holder in due course" is entitled to recover the amount of the note from the maker, even if the promissory note was originally made without consideration. The question raised is not free from difficulty and is of great importance. So far as I am aware, there is no decision of this Court bearing on this point and, I think, it should be authoritatively settled by a larger Bench. I refer the case to a Division Bench. An early date shall be fixed.

JUDGMENT OF DIVISION BENCH

Beckett J. — The facts of this case have been set out in detail in the order of reference and need only be briefly recapitulated.

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The contesting defendant, Nura, who is illiterate, executed a promissory note for Rs. 800, with interest, in favour of defendant 2 Ram Lal, who is admittedly a money-lender. Ram Lal subsequently assigned the promissory note to the plaintiff Baqar Khan. The transfer was endorsed on the promissory note, for which Baqar Khan is said to have paid Rs. 400. Baqar Khan then brought the present suit against Ram Lal and Nura for the full amount due on the promissory note. Execution of the promissory note by Nura has been proved, but the trial Judge held that the passing of consideration from Ram Lal to Nura had not been established. He dismissed the suit and granted a decree only against Ram Lal for the amount received by him from the plaintiff. The Court of first appeal found that the trial Judge had overlooked the special provisions of the law applying to a negotiable instrument after it has come into the hands of a holder in due course, which made it unnecessary to go into the question of consideration in the first instance. The plaintiff's appeal was accepted and he was granted a decree for Rs. 800 against Nura. A second appeal by Nura came up before a Single Bench, from which it was referred to Division Bench.

The liability of Nura to pay the amount due on the promissory note, irrespective of the receipt of consideration, turns on the extent to which the provisions of the Punjab Debtors Protection Act, 1936, affect the provisions of the Negotiable Instruments Act, 1881. Section 43, Negotiable Instruments Act, provides that a negotiable instrument made without consideration creates no obligation of payment between the parties to the transaction; but if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder may recover the amount due on this instrument either from his transferor or any prior party thereto. In other words, as held in 7 ALL 490,¹ it becomes unnecessary for a holder in due course to prove consideration or the execution of the instrument. When proof of consideration is necessary, however, s. 118 lays down that it is to be presumed that every negotiable instrument was made for consideration, until the contrary is proved.

If the present case were governed by these provisions of the Negotiable Instruments Act, it would clearly be unnecessary for the

1. (85) 7 All 490 : 1885 A W N 102 (F B), Rohilkhand and Kumau Bank Ltd. v. Row.

a plaintiff to prove that Nura had received any consideration from Ram Lal when he executed the promissory note; but it is claimed on his behalf that the position has been altered by the passing of the Punjab Debtors' Protection Act. Section 2 brings a loan advanced on the basis of a promissory note within the scope of the Act and further provides that a money-lender includes a representative-in-interest by way of assignment. Section 12, which is the important section for the purposes of the present case, provides that notwithstanding anything to the contrary in any other enactment, the burden of proving that any consideration b alleged to have been paid by a money-lender actually passed shall be on him, except in certain circumstances which do not arise in the present case. It is suggested that this makes it necessary for the assignee of a promissory note executed in favour of a money-lender to prove that the promissory note was executed for consideration, even though he may be a holder for consideration in due course.

It does not appear to me that this argument can hold good. So far as promissory notes are concerned, s. 12, Provincial Act, is clearly aimed at s. 118, Negotiable Instruments Act; and in any matter to which section 118 had application, its provisions would no doubt have to be taken to be modified by the Punjab Debtors' Protection Act; but on the face of it, the relevant portion of s. 118 can only apply when some question of consideration arises and is relevant to the case. If it is not necessary to prove the passing of consideration, no question relating to the burden of proof would arise. The position may be put in another way. Even if full effect is given to s. 12, Punjab Debtors' Protection Act, this would merely mean that there is no presumption that the promissory note was executed by Nura in favour of Ram Lal for consideration; and it may be taken that there is no satisfactory evidence on the record that any consideration passed. This might have absolved Nura of any obligation of payment in a suit brought by Ram Lal, but it would not in itself be sufficient to absolve him of his obligations towards a holder in due course, even though that person may have to be regarded as himself a money-lender for the purposes of the Punjab Act. There is nothing in the Act which purports to lay down that a holder in due course, if he happens to be a money-lender, in fact or constructively, must prove that a promissory note in his hands was executed

for consideration. All that s. 12 can be taken to lay down is that when a question of consideration arises, the burden of proving consideration shall be on the money-lender.

In short, it seems to me that there is nothing in the Punjab Debtors' Protection Act which can be taken as repealing the provisions of s. 43, Negotiable Instruments Act, so far as they relate to a promissory note executed in favour of a money-lender, which has come into the hands of a holder in due course, either directly or by necessary implication. It may be that the position of a holder in due course was overlooked when the Act was framed, and that a way of avoiding the provisions of the Punjab Debtors' Protection Act may be opened out by giving effect to s. 43, Negotiable Instruments Act, but in view of these provisions, it seems impossible to hold in the present case that the plaintiff, whose position as a holder in due course has not been assailed, is under any necessity of proving that Nura executed the promissory note in favour of Ram Lal for consideration. Even if the promissory note be taken as having been made completely without consideration, Nura remains liable to the plaintiff for the amount due on the note. For these reasons I would agree with the view taken by the lower appellate Court and dismiss the appeal with costs.

Tek Chand J.—I agree in the order proposed by my learned brother. There seems to be no escape from the conclusion that the Punjab Debtors' Protection Act has left untouched s. 43, Negotiable Instruments Act, and therefore a "holder in due course" of a promissory note, even though he be a 'money-lender' as defined in the Punjab Act, is entitled to recover from the maker of the note, without being under any obligation to prove that the promissory note had been executed by the maker in favour of the original obligee for valuable consideration. The decision of the learned Senior Subordinate Judge is correct and this appeal must be dismissed with costs.

G.N./R.K.

Appeal dismissed.

a property. In 4 Luck 488,¹⁰ a male heir was concerned and as would appear from the remarks of their Lordships made at p. 490 it was in that capacity that his estate was adjudged. In 14 Lah. 485,¹¹ it was expressly stated in the will that the devisee will enjoy full power to alienate.

Counsel for the respondents further contends that the question of intention is a question of fact and, consequently, this Court is not competent to disturb the concurrent findings of the Courts below on the question of the testator's intention. It is true that ordinarily the question of intention is a question of fact but when the question of the interpretation of a document of title is at the same time concerned, it is always a question of law to determine what legal inference can be deduced from the contents of the document taken as a whole. Counsel next urges that this question whether absolute estate had been conferred upon Mt. Mathra Devi or not, was *res judicata* in view of a previous decision arrived at in a case between the same parties. But, there, too, I am not disposed to agree, inasmuch as the decision of the trial Court in that case was superseded by that of the District Judge, dated 12th July 1938 and, in his judgment, he left this question open. I accordingly allow this appeal, set aside the judgments and decree of the Courts below and grant a declaration to the appellant bank to the effect that the share of Mela Ram in the shop in suit is liable to attachment and sale in the execution of its decree. The bank will get its costs from the unsuccessful party in all the Courts. At the request of the respondents' counsel, I allow a Letters Patent certificate to enable him to prefer an appeal against this order, if he so desires.

Judgment in Letters Patent Appeal

a **Sale J.**—The Peoples Bank of Northern India, Ltd. (in liquidation), holds a decree against the firm Ladha Ram Mela Ram and in execution thereof attached a shop alleged to belong to Mela Ram, proprietor of the firm. On objection by Mt. Ram Rakhi, wife of Mela Ram, the shop was released from attachment; and the Peoples Bank then instituted this declaratory suit to establish that the shop belonged to Mela Ram and not his wife. The shop originally belonged to Ladha Ram, father of Mela Ram, and was, as is now admitted, his self-acquired property. In 1910 Ladha Ram executed a will in favour of his wife Mt. Mathra Devi. On Ladha Ram's death Mt. Mathra Devi came into possession of this shop in accordance

with the terms of the will and the main question for determination in this appeal is whether this will gave Mt. Mathra Devi an absolute title or only a limited estate in her late husband's property.

On 16th August 1935 Mt. Mathra Devi transferred the shop in suit, which was part of the property bequeathed to her by her late husband's will, to Mt. Ram Rakhi, wife of Mela Ram, the son of Ladha Ram and Mt. Mathra Devi, by a deed of gift. Both the trial Court and the Senior Subordinate Judge on first appeal held that by virtue of Ladha Ram's will Mt. Mathra Devi had acquired an absolute title to the shop and that she was therefore competent to transfer it f to her daughter-in-law. On second appeal a learned Single Judge held that the will, as a document of title, had been wrongly interpreted, that on a true construction of the will, it conferred on Mt. Mathra Devi only a limited estate and, it followed, that the transfer of the shop by her to her daughter-in-law was therefore void. The learned Judge therefore accepted the appeal and decreed the suit of the Peoples Bank.

From this order Mt. Ram Rakhi, the donee, has preferred a Letters Patent appeal, urging that on a proper interpretation of the will of Ladha Ram, Mt. Mathra Devi was g given an absolute estate. The material portions of this will are recited at length at the commencement of the judgment of the learned Single Judge and need not be repeated here. The appellant relies on cl. (1) of the will which recites that on the death of the testator Mt. Mathra Devi "will be owner and possessor like myself (*misl mere malik wa qabiz*) of the entire moveable and immovable property." The subsequent clauses of the will undoubtedly have the effect of limiting Mt. Mathra Devi's title, but counsel contends that the rule of construction is that if a will contains clear dispositive words creating in the first instance an absolute estate h of inheritance and then contains clauses which purport to restrict and cut down the legatee's power over the devised property, the subsequent restrictive clauses cannot displace the effect of the dispositive words and must be regarded as merely conditions subsequent which being repugnant to the absolute estate, are void and must be rejected. This argument is based on the rule of construction laid down in 12 Lah. 286¹² by a Division Bench of this Court and by a number of other authorities. Counsel also relies

12. (30) 17 AIR 1930 Lah 695; 125 IC 888; 12 Lah 286; 32 P L R 718, *Muharram Ali v. Barkat Ali*.

on 21 Lah. 330¹³ in which their Lordships held that on a true construction of the will at issue in that case the widow took an absolute interest and a prohibition against selling must be disregarded as repugnant to the absolute gift.

In A.I.R. 1922 P.C. 198⁵ their Lordships in interpreting a will by a testator in favour of his wife held that the use of the word "malik" in the context of the particular will then under consideration, showed that the estate conveyed was absolute. They pointed out, however, that the word must always be interpreted in relation to the context, and it might be that in particular cases the circumstances or the context are sufficient to show that absolute ownership is not intended. Similarly, in A.I.R. 1922 P.C. 63⁷ their Lordships of the Privy Council laid down that a will to be properly construed must be read as a whole and that the meaning of every word in a will must always depend upon the setting in which it is placed in order to determine its true shade of meaning. In other words, as laid down by their Lordships of the Privy Council in 4 Luck. 483,¹⁰ it is necessary to determine from a reading of the will as a whole what is the paramount intention of the testator. Applying this rule of construction, we have no hesitation in agreeing with the view taken by the learned Judge in Chambers that the testator did not intend to invest Mt. Mathra Devi with full rights of ownership. In almost every clause of the will subsequent to cl. 1, the intention to limit Mt. Mathra Devi's power is explicit. Clauses 2 and 3 deal with Mt. Mathra Devi's power of management, which were, as held by the learned Judge in Chambers, plenary and debarred interference by the sons. Clause 5 provided that his wife should have no right to alienate without legal necessity. If this were the only restrictive power on Mt. Mathra Devi's title, it might indeed be held that this was a condition repugnant to the grant of absolute ownership and must be ignored, but this is far from being the only restrictive power. Clauses 6 and 7 deal with the disposition of the property after his wife's death. In cl. 6 it is laid down that if she should predecease the children, the rest of the property (other than the sum of Rs. 1000 which was to be kept apart for marriage expenses) would be equally divided among his three sons, while in cl. 7 it was provided that in

certain other circumstances the whole of the property would be divided amongst the three sons.

In other words, it is clear that the testator's intention was to confer a life estate on his wife since the will provided for the disposition of the property after his wife's death. It follows therefore that the action of Mt. Mathra Devi in gifting during her life, a portion of the property representing the shop in dispute to her daughter-in-law is directly contrary to the terms of the will. We hold therefore that Mt. Mathra Devi acquired by the will a life estate in the property subject to the conditions contained in the will and that in particular her powers of alienation were strictly limited. It was next urged by Mr. Barkat Ali that even admitting that Mt. Mathra Devi was merely a limited owner she was given the right to alienate for legal necessity, and that the alienation was not void but only voidable at the instance of the reversioners. This contention does not appear to have been taken before the learned Judge in Chambers. Indeed, Mr. Bhagwati Dayal who appeared on behalf of the Peoples Bank of Northern India as appellant before the learned Judge in Chambers, has stated at the Bar that it was conceded by the opposite party that the bank could challenge the alienation on the ground that it was made by a limited owner. Since, however, Mr. Barkat Ali's contention is based on a point of law which cannot be held to be concluded by any admission that may have been made before the learned Single Judge in Chambers, we have permitted Mr. Barkat Ali to argue this point before us. In support of his contention Mr. Barkat Ali relies on para. 185 of Mulla's Hindu Law and 45 Bom. 105.¹⁴

There is no force in this argument. In the present case there is no question of an alienation for legal necessity. Mt. Mathra Devi purported to gift a portion of the property to her daughter-in-law acting as an absolute owner under her husband's will. The principles of Hindu law governing the right of a limited owner to alienate for legal necessity do not apply in this case. Mr. Barkat Ali is unable to cite any authority in support of his contention that the same principles should apply in the case of a legatee whose title depends on the terms of a will. In the present case the alienation by Mt. Mathra Devi in favour of her daughter-in-law is directly contrary to the devolution of the property

13. (40) 27 A. I. R. 1940 P. C. 70 : 187 I. C. 440 : 67 I. A. 179 : I. L. R. (1940) Kar. P. C. 149 : I. L. R. (1940) 21 Lah. 330 (P. C.), Jagat Singh v. Sangal Singh.

14. (21) 8 A. I. R. 1921 Bom. 413 : 59 I. C. 480 : 45 Bom. 105 : 22 Bom. L. R. 1155, Sitaram Ravaji v. Khandu Mairala.

^a provided by the will of Ladh Ram, and for this reason must be held to be not merely voidable, but void. The appeal therefore fails and is dismissed with costs.

G.N./R.K.

Appeal dismissed.

A. I. R. (29) 1942 Lahore 47

YOUNG C. J. AND SALE J.

Sardar Gulab Singh — Plaintiff —
Appellant

v.

Punjab Zamindara Bank, Ltd., Lyallpur through Sardar Desa Singh, Manager and others — Defendants —
Respondents.

^b Letters Patent Appeal No. 15 of 1940, Decided on 11th July 1941, against decision of Bhide J., reported in ('40) 27 A.I.R. 1940 Lah 243.

(a) Companies Act (1913), S. 21—Company—Articles are not contract in themselves (*Obiter*).

The memorandum and articles of association of a company do not constitute any contract in themselves: (1876) 1 Ex. D. 88 and (1878) 8 Ch. 956, *Ref.* [P 49a]

(b) Contract—Express and implied contracts—Proof — Contract may be partly express and partly implied.

^c A contract may be either express or implied. An express contract can be proved by written or spoken words which constitute an agreement between the parties; an implied contract, on the other hand, may be proved by circumstantial evidence of an agreement. A contract may also be of a mixed character, that is, partly expressed in words and partly implied from acts of the parties and circumstances. [P 49b]

(c) Companies Act (1913), S. 21 — Articles not constituting contract between company and share-holder — Implied contract by acts of parties in terms of articles can be proved — Share-holder appointed managing director in pursuance of certain Articles acting as such for 11 years and remunerated in terms of Articles—Articles constitute implied contract — Share-holder is entitled to declaration that he was managing director.

^d Even if the memorandum and articles of association of a company are held not to constitute a contract in themselves, an implied contract may be proved by the acts of the parties on the terms set out in the articles of association of the company: (1892) 2 Ch. D. 158; (1898) 1 Ch. D. 324 and (1894) 3 Ch. D. 356, *Rel. on.* [P 49d]

Where in pursuance of certain articles acted upon by the company a shareholder was appointed managing director and acted as managing director for 11 years and was remunerated in accordance with the terms set out in the articles, the articles constitute an implied contract between the company and the share-holder so as to entitle him to the declaration that he was the managing director of the company. [P 49d, h; P 50a]

(d) Company — Managing director is agent and not servant of company: ('40) 27 A.I.R. 1940 Lah. 248=190 I.C. 819, *REVERSED*.

A director or a managing director is in no way a servant of the company: he is the agent of the

company for carrying on its business: ('40) 27 A.I.R. 1940 Lah. 243=190 I.C. 819, *REVERSED*. [P 50c]

(e) Specific Relief Act (1877), Ss. 21, 56 and 54 (c)—Contract—Injunction when cannot be issued—Member appointed managing director of company in pursuance of certain articles which constituted implied contract — Suit by managing director, illegally removed, for injunction restraining company from preventing him from discharging his duties — Injunction cannot be granted—Damages are adequate relief.

An injunction will not issue in the case of contracts which cannot be specifically enforced or where breach of the contract can be adequately compensated in damages. [P 50f]

In pursuance of certain articles of association the company appointed one of its members as its managing director who was subsequently illegally removed. ^f The managing director on the basis of the articles which constituted an implied contract between him and the company brought a suit for injunction to restrain the company from preventing him from discharging his duties:

Held that the principles applicable to the issue of an injunction at the instance of a dismissed servant ought also to apply in the case of a dismissed agent (managing director) of a company. It would be contrary to public policy to impose upon an unwilling principal an agent whom he did not wish to employ, especially as there was nothing to prevent an agent whose contract of agency was wrongfully broken from bringing an action for damages. In view of the provisions of Ss. 21 and 54 (c) the plaintiff was not entitled to the injunction sought for. [P 50c, d, f]

^g (f) Specific Relief Act (1877), Ss. 54 and 55—Plaintiff, managing director of company dismissed in 1932—Suit by plaintiff for declaration that he was managing director and for injunction filed in 1936—Plaintiff busily engaged in litigation against company in one form or other ever since dismissal—Plaintiff held not guilty of laches disentitling him to injunction.

The plaintiff, managing director of the company brought a suit against the company in 1936 for a declaration that he was the managing director of the company and for injunction restraining the company from preventing him from discharging his duties, although he was dismissed by the company in 1932. Even since his dismissal the plaintiff had been busily engaged in litigation against the company in one form or other:

Held that the fact that the plaintiff might have ^h been wrongly advised or mistaken in not bringing his suit in question earlier or not impleading the company in the previous suit by him could not be held to be negligence or laches, and the plaintiff in the circumstances could not be refused an injunction on the ground of laches. [P 50a, b]

M. C. Mahajan — for Appellant.

Basant Krishan — for Respondents.

Young C. J. — These are cross-appeals from the decision of Bhide J.* The plaintiff, Sardar Gulab Singh, brought an action against the Punjab Zamindara Bank Limited, Lyallpur, for a declaration that he was the Managing Director of the company. He also prayed for an injunction

* See ('40) 27 A.I.R. 1940 Lah. 243.

^a restraining the company from preventing him from acting as such. The trial Court decreed both the declaration and the injunction prayed for. On appeal the learned Senior Subordinate Judge dismissed the suit. On second appeal to the High Court, Bhide J. allowed the appeal as regards the declaration but dismissed it with regard to the injunction. Both parties have therefore filed appeals: the plaintiff against the decision disallowing him an injunction and the defendants against the decision granting the plaintiff a declaration. The plaintiff was the promoter of the company. Article 101 of the articles of association provided as follows:

^b The remuneration of the Managing Director may be by way of salary, commission, participation in profits or by any or all of these modes at the discretion of the board and they may enter into agreement with such Managing Director as to term of office subject to such conditions as they may deem necessary. But Sardar Gulab Singh, Honorary Magistrate, will be the first Managing Director to the company and his remuneration shall be 25 per cent. of the net profits. He will remain Managing Director for the time he holds shares at least of Rupees 20,000.

The company was registered and in due course commenced operation as a bank. The plaintiff Sardar Gulab Singh in accordance with Art. 101 applied for Rs. 20,000 worth ^c shares which were allotted by the board and and he paid the allotment money. He acted as Managing Director for 11 years, and for two years before he was dismissed, was paid, in accordance with Art. 101, 25 per cent. of the net profits. He received Rs. 8000 a year for these two years. The balance sheets of the company were passed every year by the company in general meetings and they show the 25 per cent. paid to Sardar Gulab Singh as Managing Director. The shareholders of the company, however, apparently did not approve of the Managing Director receiving such a large proportion of the profits and in the month of November 1931 (Ex. P-19) some ^d of the shareholders requisitioned a meeting of the company. On the agenda for the meeting two of the items were a "vote of no confidence in the Managing Director" and "the Managing Director was not entitled to 25 per cent. of the profits." No notice was given to the shareholders that the company intended to amend Art. 101. At the meeting Art. 101 was amended. This resolution amending Art. 101 was duly confirmed at a subsequent meeting. This amendment has been held, because of the lack of notice, to be invalid.

On 6th July 1932, a suit was brought by ^e those opposed to Sardar Gulab Singh for a declaration that he had ceased to be Manag-

ing Director on the ground of the amend-^e ment of the article. If this suit had proceeded, the decision would have settled the point now in dispute between the parties. In the month of October 1932, Sardar Gulab Singh was forcibly ejected from the bank and at the annual meeting of the company in November of that year Sardar Gulab Singh was compulsorily retired. In the month of August 1933 the suit was allowed to be dismissed under O. 9, R. 8, Civil P. C. The plaintiffs, therefore, from that time were barred from bringing another suit on the same cause of action. In the same month however Sardar Gulab Singh filed a suit for a declaration ^f that the election of the directors at the annual meeting was invalid, and that they should be restrained from acting. He also filed a petition for the liquidation of the company. The petition was subsequently settled and in the month of July 1936 Sardar Gulab Singh's suit was dismissed, whereupon he filed an appeal. On 12th August 1936 pending the appeal, the present suit was filed by Sardar Gulab Singh and his appeal was withdrawn as the directors had disappeared by rotation. It is necessary to give these particulars as it has been held by the lower Court that Sardar Gulab Singh was guilty of laches in not bringing his present ^g suit earlier. It is to be noted that in all these proceedings by the company it was never denied that Sardar Gulab Singh was the Managing Director, and even in the present suit it was never raised that there was no contract between the company and Sardar Gulab Singh until the appeal. In fact in all the actions it was taken for granted that Sardar Gulab Singh had been acting as the Managing Director of the company.

The first point argued by Mr. Basant Krishen on behalf of the company was that the memorandum and articles of association of the company did not constitute a contract ^h between the company and Sardar Gulab Singh and in support of his argument he drew our attention to several English authorities based on a provision similar to s. 21, Indian Companies Act in the English Companies Act. Section 21 enacts as follows:

The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

If the matter had been *res integra* it is possible that we might have held that the

a terms of s. 21 did provide that Art. 101 of the articles of association of the Punjab Zamindara Bank, Ltd. constituted a contract between Sardar Gulab Singh and company when registered. In view, however, of the long series of decisions of eminent Judges of the English Courts, which have clearly laid down that the articles of association did not constitute any contract and in particular the decisions in *Eley's case* (1876) 1 Ex.D. 88¹ and in *Pritchard's case* (1873) 8 Ch.A. 956² at page 960 we would hesitate to disagree with the distinguished Judges who have decided to the contrary. It is moreover unnecessary in this case to decide this appeal upon this point. Mr. Mehr Chand on behalf of Sardar Gulab Singh contends that even if s. 21, Companies Act does not constitute a legal and binding contract between the parties there is in this case an implied contract between the company and Sardar Gulab Singh in the terms of Art. 101. A contract may be either express or implied. An express contract can be proved by written or spoken words which constitute an agreement between the parties and an implied contract, on the other hand, may be proved by circumstantial evidence of an agreement. A contract may also be of a mixed character, c that is, partly expressed in words and partly implied from acts of the parties and circumstances. Mr. Mehr Chand contends that by the acts of the parties a contract was clearly implied in the terms of Article 101. Sardar Gulab Singh applied for and obtained rupees 20,000 worth of shares, which were allotted by the Board. He was the Managing Director and acted as Managing Director for 11 years and he was remunerated in accordance with the terms set out in Art. 101. As we have already pointed, it was never contended until the appellate stage that Sardar Gulab Singh had not acted and been remunerated as Managing Director. In the suit itself no issue d was struck on this point, the only issue was whether Sardar Gulab Singh had been improperly removed from the office of Managing Director. It seems to us therefore that an implied contract on the terms of Art. 101 has been clearly proved.

There is ample authority for the proposition that under circumstances, such as in this case, it is possible to prove an implied contract even though the memorandum and articles of association are held not to consti-

tute a contract in themselves. *Isaacs' case* e reported in (1892) 2 Ch.D. 158³ appears to us to be an authority on all fours with the present case. In *Isaacs' case*³ the articles of association provided that the qualification of a director should be the holding of shares of the nominal amount of £1000 and that a director should acquire his qualification shares within one month of his appointment. If he did not do so, he should be deemed to have agreed to take the said shares and that the shares should be forthwith allotted to him. Sir Henry Isaacs signed the memorandum and articles of association for one share. He acted as a director for more than a year but never applied for any shares, nor were f any allotted to him, nor was he registered as a member of the company. The company went into liquidation and the Court of appeal held that Sir Henry Isaacs had agreed with the company to take, and the company had agreed to allot to him, the shares which constituted his qualification as a director and that accordingly he was liable to be settled on the list of contributories in respect of that number of shares. The learned Lord Justices held that the action of Sir Henry Isaacs in acting as a director in addition to the terms of the articles amounted to an implied contract between him and the company. In *Be. g ckwith's case* (1898) 1 Ch.D. 324⁴ it was held that although the provisions in the articles were only part of the contract between the shareholders inter se, the provisions in the articles were, on the directors being employed and accepting office on the footing of them, embodied in the contract between the company and the directors and on the winding up of the company the directors were therefore entitled to rank as ordinary creditors in respect of the remuneration due to them at the commencement of the winding up. In (1894) 3 Ch.D. 356,⁵ *Isaacs' case* (1892) 2 Ch. 158³ was followed by the Court of Appeal and the decision of Wright J. in the lower Court that by accept- h ing office and acting as directors, the directors had agreed to take the qualification shares in accordance with the terms set out in the articles of association of the company was upheld. It is clear therefore that both on principle and on authority an implied contract may be proved by the acts of the parties on the terms set out in the articles of

1. (1876) 1 Ex.D. 88, *Eley v. Positive Government Security Life Assurance Co.*

2. (1873) 8 Ch. 956: 42 L.J.Ch. 768: 29 L.T. 363: 21 W.R. 829, *In re Tavarone Mining Co.*

3. (1892) 2 Ch.D. 158: 61 L.J.Ch. 481: 66 L.T. 593: 40 W.R. 518, *Anglo-Austrian Printing Co., In re.*

4. (1898) 1 Ch.D. 324: 67 L.J.Q.B. 164, *New British Iron Co., In re.*

5. (1894) 3 Ch. D. 356: 64 L. J. Ch. 27: 7 R. 504: 1 Manson 431: 71 L. T. 234, *In re R. Solton and Company.*

a association of the company. The plaintiff Sardar Gulab Singh therefore having proved the contract between himself and the company is, in our opinion, entitled to the declaration prayed for and in this view we are in agreement with the learned single Judge of this Court.

With regard to the second point, whether Sardar Gulab Singh is entitled to an injunction, the learned single Judge decided that he was barred, *inter alia*, on the ground that he was guilty of laches in having delayed bringing the present suit. While we are in agreement with the learned single Judge that in this case an injunction should not issue, b we would not have refused to grant it on this ground. The suit brought by the opponents of Sardar Gulab Singh in July 1932 if proceeded with would have settled the whole case, but, for their own reasons, they did not proceed with that suit. Sardar Gulab Singh immediately brought other legal proceedings against the company. He may have been wrongly advised or mistaken in not bringing his present suit, or in not impleading the bank in the former suit, but we do not think that this can be held to be negligence or laches disentitling him to an injunction. He has been busily engaged in litigation in one c form or another ever since his dismissal.

On other grounds however, we do not consider that in this case it would be proper to issue an injunction. The learned Judge held that the position of the company and that of Sardar Gulab Singh as managing director was that of master and servant. With great respect we do not think that this is correct. A director or a managing director is in no way a servant of the company: he is the agent of the company for carrying on its business. But we agree that the same principles which have been held to apply to the issue of an injunction at the instance of a dismissed servant ought also to apply in the d case of a dismissed agent. It would be contrary to public policy to impose upon an unwilling principal an agent whom he does not wish to employ, especially as there is nothing to prevent an agent whose contract of agency has been wrongfully broken from bringing an action for damages. Section 21, Specific Relief Act, enacts that certain contracts cannot be specifically enforced, e. g., if a contract depends on the personal qualifications or volition of the parties, or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms; or a contract which is in its nature revocable, or a contract the per-

formance of which involves the performance e of a continuous duty extending over a longer period than three years from its date, such contracts cannot be specifically enforced. It appears to us that the contract in this case contains terms to which some of these provisions are applicable. The company could, if a majority of the share-holders in a general meeting properly convened, so wish, amend the articles of association though this action might give cause for an action for damages for breach of contract. The contract clearly extends over a longer period than three years from its date and it also depends on the volition of the parties. It has been invariably f held that an injunction will not issue in the case of contracts which cannot be specifically enforced, and the Courts have always held that where breach of the contract can be adequately compensated in damages an injunction will not issue (*see also* S. 54 (c), Specific Relief Act). We therefore for the reasons given, dismiss both the plaintiff's and the defendants' appeal. Under the circumstances we make no order as to costs.

G.N./R.K.

Appeals dismissed.

* * A. I. R. (29) 1942 Lahore 50

FULL BENCH

DALIP SINGH, BHIDE AND RAM LALL JJ. g

*Firm Shiv Ram Punnun Ram through
Shiv Ram and Punnun Ram —*

Plaintiffs — Petitioners

v.

Faiz — Defendant — Respondent.

Civil Revn. No. 303 of 1939, Decided on 15th May 1941, case referred by Ram Lall J., to Division Bench on 11th July 1939, which again referred to Full Bench on 9th February 1940.

* * Stamp Act (1899), Articles 1, 5 and 15 — Balance couched in words "*bagi rahe lena lekha karke*" written by creditor, signed by debtor and attested by witnesses amounts to acknowledgment within Art. 1 and not to agreement within Art. 5 or to bond within Art. 15: 33 P. L. R. 940 = ('32) 19 A. I. R. 1932 Lah. 470 = 137 I. C. 840; 16 Lah. 258 = ('34) 21 A. I. R. 1934 Lah. 835 = 155 I. C. 1074; 40 P. L. R. 193 = ('38) 25 A. I. R. 1938 Lah. 508 = 177 I. C. 270; 40 P. L. R. 231 = ('38) 25 A. I. R. 1938 Lah. 511 = 178 I. C. 197 and 41 P. L. R. 194 = ('39) 26 A. I. R. 1939 Lah. 486 = 188 I. C. 420, **OVERRULED.**

The real nature of stamp duty is not based on the legal obligation flowing from a document but is based on the nature of the document itself. What is taxed in other words is not the transaction but the document and, therefore, whatever implied promise there may be involved in an unconditional acknowledgment, it can never be a bond unless the obligation is contained in the document itself in express terms. [P 55d,e]

The expressions "*bagi dena, bagi lena, or bagi rahi*" mean really the same thing, viz., that such

and such balance is payable. When this phraseology is employed and there are no other words expressing any promise to pay, the entries should be taken to amount to mere acknowledgment and would be chargeable as such with a duty of one anna only if the acknowledgment is for a sum more than Rs. 20. Of course, if the acknowledgment includes any stipulation as to interest or to deliver any goods or other property the entry will be taken out of the scope of the article, by virtue of its proviso. If the phraseology of the entry itself contains a distinct promise to pay, it will be called as an agreement. If the entry is also attested it will be classed as a bond. [P 56a,e]

A balance couched in the words "*baqi rahe lene lekha karke*" written by the creditor and signed by the debtor and attested by a witness amounts to an acknowledgment under Art. 1 of Sch. 1 and is not an agreement under Art. 5 or a bond under Art. 15 of the same schedule : 33 P. L. R. 940=(32) 19 A.I.R. 1932 Lah. 470= 137 I.C. 840 ; 16 Lah. 258=(34) 21 A.I.R. 1934 Lah. 835=155 I.C. 1074 ; 40 P. L. R. 193=(38) 25 A. I. R. 1938 Lah. 503=177 I. C. 270 ; 40 P. L. R. 231 =(38) 25 A. I. R. 1938 Lah. 511=178 I.C. 197 and 41 P. L. R. 194=(39) 26 A. I. R. 1939 Lah. 486= 188 I. C. 420, *OVER-RULED* ; *Case law discussed.* [P 54a ; P 55e]

Asa Ram Aggarwal — for Petitioners.

M. Sleem, Advocate-General — for Respondent.

ORDER OF REFERENCE TO DIVISION BENCH

Ram Lall J. — After a balance is struck in the *bahi* of the creditor the phrase "*baqi rahe lene lekha karke*" occurs and thumb impression of the debtor is affixed thereto. The phrase may be translated as follows : "After going through the accounts the balance to be recovered from" The question is whether the above entry is merely an acknowledgment or an agreement. If it is an acknowledgment, the charge would be stamp duty of one anna and if an agreement then stamp ad valorem of Re. 1. If it be an agreement and is attested by witnesses, it would be a bond and charged with ad valorem stamp duty. The trial Court held that the use of the words "*baqi rahe lene*" made in the instrument which was attested by the witnesses was a bond and ordered ad valorem duty. A revision petition has been filed in this Court against this order through Mr. Asa Ram Aggarwal but no one appeared to oppose the same. The point appeared to be difficult, important and one of frequent occurrence. I, therefore, asked Mr. Bhagwat Dayal to assist me *amicus curiæ*. I have heard a long and learned argument on the whole question.

A similar point is also raised in a Civil Reference No. 8 of 1939 made by the learned Collector, Shahpur district. Here the entry is "*baqi lene*" or balance to be recovered and is thumb-marked by the debtor. The learned Collector here considered that the

use of the word "*lene*" in the instrument amounted to a promise to pay within the meaning of s. 25 (3), Contract Act, and, therefore, the instrument amounted to an agreement. Since the decision by the Privy Council in 33 Cal. 1047,¹ there has been considerable divergence of opinion in interpreting the dictum of their Lordships. That was a case under s. 19, Limitation Act, and their Lordships held that an unconditional acknowledgment implied a promise to pay. In 17 Lah. 1² the question was whether a memorandum of a transaction in a vendor's *bahi* thumb-marked by the purchaser was chargeable to stamp duty and it was held that it was not chargeable at all, being neither an acknowledgment nor an agreement. Tek Chand J. in delivering the judgment of the Full Bench quoted the well-known dictum of Hawkins J. in (1892) 2 Q.B. 483³ to the effect that

the mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty; it is only so chargeable when the document amounts to an agreement of itself or to a memorandum of an agreement already made.

And later the learned Judge observed at page 8 as follows :

It may be stated, however, that in considering whether a document is governed by the article or the proviso, it is important to bear in mind the well settled (but often forgotten) principle that it is the document as it stands, and not the bargain to which it refers, which has been made chargeable to stamp duty. As has been well put, the duty is on the instrument and not on the transaction. If therefore a document is so worded that it expressly, or by necessary implication, comes within a particular provision of the Act, it must be stamped accordingly. But the implication must arise from the phraseology used in the document, and not be a matter of legal inference or presumption.

It would *prima facie* appear therefore that a document which does not contain an express promise to pay but from which a promise to pay can be deduced as an implication by means of legal deduction or with the help of legal presumptions is not a document within the scope of the section. Where the promise to pay has to be extracted out of the language used in the instrument, it is obvious, there is no express promise to pay which would attract the application of the Stamp Law. The practice of the Lahore High Court has not been uniform and there is some

1. (1906) 33 Cal. 1047 : 33 I.A. 165 : 2 N.L.R. 130 : 4 C. L. J. 94 : 10 C. W. N. 874 (P. C.), *Maniram Seth v. Seth Rup Chand*.

2. (1935) 22 A.I.R. 1935 Lah. 567 : 158 I.C. 234 : 17 Lah. 1 : 38 P. L. R. 390 (F.B.), *Nanak Chand v. Fattu*.

3. (1892) 2 Q.B. 484 : 61 L.J.Q.B. 696 : 56 J.P. 665, *Carlill v. Carbolic Smoke Ball Co.*

^a divergence of authority in this Court. In A.I.R. 1981 Lah. 681⁴ an unconditional acknowledgment to pay was held liable to duty as an agreement on an interpretation of the dictum of the Privy Council in the Privy Council case referred to already. This judgment appears to be too widely expressed and the actual words of the instrument are not stated in the body of the judgment. I sent for the High Court tablet of the case and the entry is not reproduced in any of the judgments of the lower Courts. It was explained, however, in 17 Lah. 1² by one of the learned Judges who was a party to this decision that the judgment in this case was not intended to lay down a rule of universal application. The proviso to Art. 1 indicates that there can be an acknowledgment without a promise to pay; otherwise the proviso would become meaningless.

In 34 P.L.R. 417⁵ Bhide J. held that a promise to pay cannot be deemed to be included in an acknowledgment for the purpose of the Stamp Act. The words of this instrument in the case were "The account of so and so, *baqi rahe* Rs. 744-4-6" and the entry was thumb-marked by the debtor. This was held to be a mere acknowledgment. In A.I.R. 1938 Lah. 511⁶ Jai Lal J. held that where a balance ^c had been struck in the creditor's bahi and was signed by the debtor, the document was an agreement and not a mere acknowledgment. The words there were "*baqi rahe lene lekha karke*." This judgment professes to follow the rule laid down in A.I.R. 1931 Lah. 681⁴ which the learned Judge considered was approved in 17 Lah. 1² whereas in fact it was said in the Full Bench case that the earlier case laid down no rule of general applicability. The learned Judge disapproved of 34 P. L. R. 417⁵ but as there is no discussion of the subject, this case cannot be taken to be authoritative. In 38 P. L. L. 269⁷ Jai Lal and Sale JJ. considered a similar point and ^d it was held there that before an instrument could be held to be a bond, there must be an express promise to pay which could not be inferred from the mere fact of acknowledgment, and in this sense 34 P. L. R. 417⁵ was approved. It may be mentioned in this

connexion that in 22 Cal. 757,⁸ the learned Judges in dealing with the case of a bond laid down the law as follows :

The important word in this definition is the word 'obliges,' and no document can be a bond within it unless it is one which itself creates an obligation to pay money, as is the case with those documents which are known as bonds according to the common use of the word, but is not the case with acknowledgments of advances, or of the purchase and receipt of goods, the obligation to pay for which is not created by the instrument but arises from the promises to repay advances and to pay for goods, which the law always implies when money is borrowed or goods are purchased.

In 119 I. C. 417,⁹ Dalip Singh J., held that an unconditional acknowledgment implies a promise to pay and such an acknowledgment ^f if unstamped can be admitted into evidence on payment of the requisite penalty. 10 Lah. 745¹⁰ and 10 Lah. 748¹¹ were cases under the Limitation Act and the position under the Stamp Act was not considered. There it was held that unconditional acknowledgment would amount to a promise to pay. On the other hand, in R.S.A. 270 of 1938¹² Din Muhammad J., decided on facts almost identical with those in A. I. R. 1938 Lah. 511⁶ in a contrary sense. It appears to me that the judgment of Din Muhammad J., is more in accord with the current of authority. In A. I. R. 1938 Lah. 503¹³ Tek Chand and Dalip ^g Singh JJ. held that ordinarily a balance struck by the debtor followed by the words "*baqi rahe*" and signed by the debtor would be a mere acknowledgment. But where the words used were "*baqi dene*" that would amount to be an agreement and liable to stamp duty as such. If this agreement was attested by witnesses, it would be liable to ad valorem stamp duty as a bond. In the other High Courts, the position appears to be accepted that entries using the words "*lene*" and "*dene*" and thumb-marked by the debtor are mere acknowledgments. Reference in this connexion may be made inter alia to the following reported cases : 50 I. C. 781,¹⁴ ^h

8. ('95) 22 Cal. 757, Hira Lal v. Queen-Empress.

9. ('30) 17 A. I. R. 1930 Lah. 177 : 119 I. C. 417, Firm Ram Ditta Mal Ram Dhan v. Kesar Das.

10. ('29) 16 A.I.R. 1929 Lah. 263 : 115 I. C. 764 : 10 Lah. 745 : 30 P.L.R. 240, Kahan Chand-Dula Ram v. Daya Ram Amrit Ram.

11. ('29) 16 A.I.R. 1929 Lah. 264 : 115 I. C. 853 : 10 Lah. 748 : 30 P. L. R. 226, Fateh Chand v. Ganga Singh.

12. Reported in ('39) 26 A. I. R. 1939 Lah. 466 : 186 I. C. 718 : 41 P. L. R. 878, Joti Pershad v. Raham Ali.

13. ('38) 25 A.I.R. 1938 Lah. 503 : 177 I. C. 270 : 40 P. L. R. 193, Firm Tek Chand-Daqlat Ram v. Ata Mohammad.

14. ('19) 6 A. I. R. 1919 Nag. 141 : 50 I. C. 781, Sitaram v. Thakurdas.

4. ('31) 18 A.I.R. 1931 Lah. 681 : 132 I.C. 881, Pahlad v. Shih Lal.

5. ('33) 20 A.I.R. 1933 Lah. 271 : 142 I.C. 535: 34 P.L.R. 417, Jagan Nath v. Mt. Chauli.

6. ('38) 25 A.I.R. 1938 Lah. 511 : 178 I.C. 197: 40 Cr.L.J. 9: 40 P.L.R. 281, Firm Duli Chand Maidhan v. Panthi.

7. ('37) 24 A.I.R. 1937 Lah. 220 : 170 I.C. 68 : 38 P.L.R. 269, Dewan Chand v. Punjab and Kashmir Bank Ltd.

- ^a 52 Bom. 521,¹⁵ 21 Mad. 49,¹⁶ 38 Mad. 660,¹⁷
54 ALL. 506,¹⁸ A.I.R. 1934 Nag. 273¹⁹ and A.I.R.
1935 Nag. 221.²⁰

There thus appears to be a considerable conflict of opinion in this Court as evidenced by the following decisions : 36 P. R. 1886,²¹ 35 P. R. 1903,²² 68 P. R. 1904,²³ 102 P. R. 1905,²⁴ 119 P. R. 1908,²⁵ 132 I. C. 844,²⁶ 33 P.L.R. 940²⁷ and particularly A.I.R. 1938 Lah 511⁶ on the one side and 34 P. L. R. 417⁵ and R. S. A. No. 270 of 1933¹² on the other. In view of this conflict and in view of the fact that this and similar questions are arising in Courts nearly every day and in further view of the fact that the interests of the

^b Chief Revenue Authority are intimately affected, I consider that the matter is one on which an authoritative pronouncement is essential and therefore should be dealt with by a larger Bench. These papers will accordingly be laid before the Hon'ble the Chief Justice for such action as he may consider necessary. In the event of these cases being sent to a larger Bench, I consider that notice of hearing should be given to the Chief Revenue Authority with a suggestion that the learned Advocate-General should be instructed to appear personally in the High Court.

^c ORDER OF REFERENCE BY DIVISION
BENCH TO FULL BENCH

Din Mohammad J. — This case was referred to a Division Bench as my

15. ('28) 15 A.I.R. 1928 Bom. 319 : 112 I. C. 24 : 52 Bom. 521 : 30 Bom.L.R. 733, Maganlal Harjibhai v. Amichand Gulabji.
16. ('98) 21 Mad. 49 : 7 M. L. J. 291, Tirupati Goundan v. Rama Reddi.
17. ('14) 1 A.I.R. 1914 Mad. 657 : 21 I.C. 864 : 38 Mad. 660 : 26 M. L. J. 19, Muthu Sastrigal v. Visvanatha Pandarasannadhi.
18. ('32) 19 A. I. R. 1932 All. 461 : 140 I. C. 783 : 54 All. 506 : 1932 A. L. J. 279, Girdhari Lal v. Bishun Chand.
^d 19. ('34) 21 A.I.R. 1934 Nag. 278 : 153 I. C. 255 : 31 N.L.R. 105, Ram Chandra Bachhraj v. Muka.
20. ('35) 22 A. I. R. 1935 Nag 221 : 159 I. C. 447, Sham Lal v. Gulab Chand.
21. ('86) 36 P. R. 1886, Pt. Harkishen Das v. Pir Baksh.
22. ('03) 35 P. R. 1903 : 101 P. L. R. 1903 (F.B.), Daula v. Ganda.
23. ('04) 68 P. R. 1904: 123 P. L. R. 1904, Ganpat v. Daulat Ram.
24. ('05) 102 P. R. 1905, Mahbub Jan v. Nur-ud-Din.
25. ('08) 119 P. R. 1908, Pala Mal v. Tula Ram.
26. ('81) 132 I C 844 : 32 P. L. R. 767, Relu Mal v. Shoran.
27. ('32) 19 A. I. R. 1932 Lah 470 : 137 I. C. 840: 33 P. L. R. 940, Kanshi Ram-Banshi Ram v. Arjan Das.

learned brother Ram Lall J. was of opinion that the authorities even of this Court on the question involved in the case were not uniform. The question is whether a balance couched in the words "*baqi rahe lene lekha karke*" written by the creditor and signed by the debtor and attested by a witness amounts to an acknowledgment under Art. 1 of Sch. 1, Stamp Act or is an agreement under Art. 5 or a bond under Art. 15 of the same Schedule. The authorities that are relevant to the consideration of this matter have been summarised in Annexure A.*

It is obvious that in most cases where the payment of interest has been agreed upon, the entry has been held to be something more than a mere acknowledgment. But, where this is not the case, the general trend of authority is that the entry is a mere acknowledgment. In the latest authority of this Court reported in 41 P. L. R. 194,²⁸ reference has been made to the Full Bench judgment reported in A. I. R. 1938 Lah 234,²⁹ but, with all respect, I may observe that the Full Bench judgment is not universally applicable, inasmuch as the entry there contained a promise to pay interest. It is true that Dalip Singh J. remarked :

A long course of rulings has held, not only on the question of interest but where the words used amount to the words, 'is payable' or 'to be paid' or 'to be taken' or 'to be given' '*baqi dena*', '*baqi lena*,' etc., almost invariably that such words amount to a promise to pay within the meaning of S. 25 (3), Contract Act.

But, again with all respect, I may say that this remark was in the nature of obiter dictum and is not literally correct, as would appear from Annexure A.

The Full Bench case reported in 17 Lah. 1,³ is also distinguishable as it deals with a different matter altogether. Further, the Advocate General has pointed out that in none of the cases referred to in the Annexure A has the attention of the Judges been drawn to S. 6, Stamp Act, which contemplates that an entry may be covered by more than one definition. I am therefore definitely of opinion that the matter involved in this case should be referred to a Full Bench so that the controversy may be set at rest once for all. The connected Civil Ref. No. 8 of 1939 can also be decided at the same time by the same Full Bench.

28. ('39) 26 A.I.R. 1939 Lah 486 : 188 I. C. 420 : 41 P. L. R. 194, Fateh Mohammad v. Surja.

29. ('38) 25 A.I.R. 1938 Lah 234 : 174 I. C. 277 : I.L.R. (1938) Lah 193 : 40 P. L. R. 533 (F.B.), Shanti Parkash v. Harnam Das.

* For Annexure A see pages 56 to 58.

a Ram Lall J. — I agree that the question raised is one of great importance and frequent occurrence and should therefore be decided by a Full Bench.

OPINION

b Dalip Singh J. — The question arising for decision in this case is whether certain entries in a bahi have been rightly treated as bonds or agreements or whether they should be treated as acknowledgments and should be charged stamp duty or not charged as the case may be accordingly. The first entry in question is as follows: "*Baqi rahe lene lekha karke rupees 150.*" The entry is stamped with a one anna stamp. It is attested by two witnesses and thumb-marked by the debtor. This entry has been treated as a bond. The second entry is in the same words. The sum is Rs. 100. The stamp is one anna. It is attested by two witnesses and treated as a bond. The third entry is the same as the second entry. In the fourth entry the words are "*baqi rahe lene lekha tara Rs. 484-3-0.*" The stamp is one anna. It is attested and is treated as a bond. The fifth entry is in the words of the first entry. The sum is Rs. 439-4-0. The stamp is one anna. It is not attested and is treated as an agreement. In *c* the sixth entry the words are the same as in the first. The sum is Rs. 1000. The stamp is four annas. It is attested and is treated as a bond. The seventh entry is "*baqi rahe*". The sum is Rs. 1480. The stamp is one anna. It is attested and is treated as an acknowledgment. The eighth entry is "*baqi rahe lene*." The sum is Rs. 1000. The stamp is one anna. It is attested and is treated as a bond. The ninth entry is "*baqi rahe lene*". The sum is Rs. 1750. It is not signed and not attested. It is therefore nothing but a memorandum.

d The question is whether these words merely amount to an acknowledgment or import a promise to pay. In the latter case they will amount either to an agreement or, if attested, to a bond. There are a number of rulings on the subject. The first ruling to which reference may be made is 35 P.R. 1908.²² That was a case where the words as given in that judgment stipulated interest and they were construed as a promise to pay. It was pointed out in that judgment that each entry has to be considered on its merits and the intention of the parties will determine whether the language which is often not particularly accurate meant to import a promise to pay or merely amounted to an acknowledgment that a certain sum was due. Two earlier

rulings 72 P.R. 1879³⁰ and 33 P.R. 1882³¹ also were rulings where there was a stipulation for interest and these were construed as importing a promise to pay. In 36 P.R. 1886³¹ the words "*baqi*" without the word "*lene*" or "*dene*" was construed as not importing a promise to pay. In 4 P.R. 1885 (Rev.)³² the English translation is given as "balance payable". It was held that this was not a bond or an agreement. In 68 P.R. 1904²³ the words "*baqi adhe*" were held not to import a promise to pay. In 119 P.R. 1908²⁵ the words "*baqi dene rahe*" were held not to import a promise to pay. In 102 P.R. 1905²⁴ the words "*as sar-i-nau hisab kar ke baqi mere zimme rahe kih sanad rahe*" were held to import a promise to pay. In 135 P.W.R. 1910 = S.I.C. 575³³ interest was promised to be paid. In A.I.R. 1932 Lah. 470²⁷ the words "*baqi dene*" were construed to import a promise to pay. In 34 P.L.R. 417⁵ the words "*baqi rahe*" were held to be merely an acknowledgment. In 16 Lah. 258³⁴ the words "*baqi dene kite*" were held to import a promise to pay. In I.L.R. (1938) Lah. 193²⁹ interest was stipulated to be paid. In A.I.R. 1938 Lah. 503¹³ Tek Chand J. and myself held that there was a distinction between the words "*baqi dene*" and "*baqi rahe*". "*Baqi rahe*" would not import a promise to pay. "*Baqi dene*", it was thought, would ordinarily import a promise to pay. In A.I.R. 1938 Lah. 511⁶ Jai Lal J. held that "*baqi rahe lene lekha kar ke*" imported a promise to pay. In 41 P.L.R. 878¹² Din Mohammad J. interpreted the words "*baqi rahe lene*" as not importing a promise to pay. In 41 P.L.R. 194²⁸ the words "*baqi rahe lene*" were construed by Tek Chand J. as importing a promise to pay.

In addition to these Punjab rulings, we have been referred to 54 ALL. 506¹⁸ where the words "*baqi dene rahe hisab kar ke*" were held not to import a promise to pay. In 52 Bom. 521¹⁵ the words "*baqi dewa*" interpreted as balance due were held not to import a promise to pay. In A.I.R. 1929 Cal. 444³⁵ the words "I remain liable to pay" were held not to import a promise to pay. In A.I.R. 1935 Nag. 221²⁰ the words "*rupayya dena baqi qabul hai*" were held not to

30. ('79) 72 P.R. 1879, *Ladhu Saha v. Fazl Dad*.
 31. ('82) 33 P.R. 1882, *Jyaram v. Sadaram*.
 32. ('85) 4 P.R. 1885 (Rev.), *Chamba Ram v. Crown*.
 33. ('10) 3 I.C. 575 : 135 P.W.R. 1910, *Bhola Ram v. Nanak Chand*.
 34. ('84) 21 A.I.R. 1934 Lah. 835 : 155 I.C. 1074 : 16 Lah. 258 : 37 P.L.R. 478, *Nihalu Ram Chela Ram v. Radhu Ram Hukmi Ram*.
 35. ('29) 16 A.I.R. 1929 Cal. 444 : 121 I.C. 412 : 57 Cal. 394 : 33 C.W.N. 965, *Sasi Kanto v. Sonaula*.

a import a promise to pay. In 21 Mad. 49¹⁶ the words "I am liable to pay" were held not to import a promise to pay. In this conflict of rulings, it seems to me that the principle laid down in the Full Bench ruling referred to above, namely, 35 P.R. 1908²² is the correct principle. Each entry has to be weighed on its merits and with reference to the circumstances of the case and a decision arrived at as to whether the words in question import or do not import promise to pay. The distinction drawn in A.I.R. 1938 Lah. 508¹³ between "*baqi dene*" and "*baqi rahe*" does not, in view of what we have heard today and the inquiries made by the b Bench from various members of the Bar, seem to be well founded. It would appear that the words "*baqi rahe*" and "*baqi rahe dene*" or "*baqi rahe lene*" are loosely used to convey the same idea, namely, balance due. This being so, in the circumstances of this case, which comes from Ambala where the language is perhaps nearer to Urdu than the language in the rest of the Punjab, I would hold that the entries which have been given in detail above do not import a promise to pay and that they should be treated merely as acknowledgments. They are not bonds and not agreements.

c I now pass on to notice that in 38 P.L.R. 269⁷ a Division Bench (Jai Lal and Sale JJ.) held that a certain document was not a bond. It was conceded by counsel in that case that it was an agreement. It was obvious, however, that if the document was an agreement and was attested, it must become a bond. Now I have only to notice the last contention of the Advocate General, namely, that the entries in question are bonds or agreements by reason of the terms of S. 6, Stamp Act, which contemplates that a document may fall into two categories and since every unconditional acknowledgment implies a promise to pay, therefore, all unconditional d acknowledgments are agreements and, if attested, are bonds, because by the definition of a bond the person executing the bond obliges himself to pay a certain sum. According to him, therefore, since an unconditional acknowledgment by reason of the implied promise to pay obliges a person to pay the sum acknowledged, therefore, it is, if attested, always a bond. He conceded that the language about an agreement in the Stamp Act being different, it might remain only an acknowledgment and not an agreement. It seems to me, however, that this argument mistakes the real nature of stamp duty which is not based on the legal obliga-

tion flowing from a document but is based on the nature of the document itself. What is taxed in other words is not the transaction but the document and therefore whatever implied promise there may be involved in an unconditional acknowledgment, it can never be a bond unless the obligation is contained in the document itself in express terms. I, therefore, see no force in this contention of the learned Advocate General. I would leave the parties to bear their own costs in this reference to the Full Bench.

Bhide J. — I agree and would like to add only a few observations. The question whether the various entries with respect to balances struck by the defendant in plaintiff's *bahi* from time to time are to be classed as acknowledgments, agreements or bonds for the purposes of duty chargeable under the Stamp Act has to be decided on the basis of the language used. As pointed out in the Full Bench ruling 17 Lah. 1³ at p. 9, it is the phraseology used and not the legal implications following from it that determines the duty chargeable on such cases. In most cases in which balances are struck from time to time as in this case, the object is to extend the period of limitation and nothing more. The promise to pay is made at the time when the original loan is advanced and there is no necessity to make any fresh promise to pay so long as the period for limitation has not expired. But when the debt remains unpaid and the period of limitation is about to expire, the creditor generally requires the debtor to make an entry in his account-book acknowledging the balance due so that it may serve to extend the period of limitation. Such entries usually fall within the category of "acknowledgments" as given in Article 1 (Sch. 1), Stamp Act, except when they are taken out of the scope of the article by the proviso thereto. Article 1 (Sch. 1), Stamp Act, runs as follows :

Acknowledgment of a debt exceeding Rs. 20 in amount or value, written or signed by, or on behalf of, a debtor in order to supply evidence of such debt in any book (other than a banker's pass-book) or on a separate piece of paper when such book or paper is left in the creditor's possession : provided that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property.

As pointed out above, in most cases of this type, the object is merely to supply evidence of an acknowledgment of the debt and nothing more. What usually happens is that the accounts are gone into, a balance is struck in the account book and is signed by the debtor. Sometimes the entry is also attested

^a by witnesses. The phraseology employed usually is *baqi dene*, *baqi lene*, or *baqi rahe*, but all these expressions appear to mean really the same thing, viz., that such and such balance is payable. Even when the entry is merely *baqi rahe* (balance remains) without the words *dene* or *lene* I take it to mean '*baqi dene rahe*' or '*baqi lene rahe*,' i. e., (balance remains payable). In other words, the expression *baqi rahe* seems to be merely an abbreviated form of the expression *baqi dene* (or *lene*) *rahe*. I am unable to see any material distinction between these entries so far as the meaning of the phraseology is concerned. I am therefore, of ^b opinion that when this phraseology is employed and there are no other words expres-

sing any promise to pay the entries should be taken to amount to mere acknowledg-^e ment and would be chargeable as such with a duty of one anna only if the acknowledgment is for a sum of more than Rs. 20. Of course if the acknowledgment includes any stipulation as to interest or to deliver any goods or other property the entry will be taken out of the scope of the Article, by virtue of its proviso. If the phraseology of the entry itself contains a distinct promise to pay, it will be called as an agreement. If the entry is also attested it will be classed as a bond.

Ram Lall J. — I agree with Bhide J., and have nothing further to add. ^f

R.K.

Question answered.

ANNEXURE "A"

Authority; Entry.	Decision.	Judge or Judges.
4 P. R. 1885 (Rev.) ³² Account of Roda. . . . 16th Magh St. 1937. Rs. . . balance payable by Roda. . . struck on . . . by Ram Kapur at the dictation of both parties, accounts made up of. . . Mark of Roda. . . Signature of Dyal Mehra at the request of Roda. . .	Entry not a bond within the meaning of the Stamp Act.	Col. Davies, Financial Commissioner.
86 P. R. 1886. ²¹ ^c Rupaye . . . rok baqi miti Poh. . . <i>sabani</i> Pir Bux di . . . nishani Pir Bux.	No express or implied promise to pay.	Tremlett and Smyth JJ. ^g
68 P. R. 1904. ²³ Lekha Ganpat . . . <i>Sambat</i> . . . <i>rupaya</i> . . . <i>baqi ahde rupaya</i> <i>hathi</i> Ganpat <i>di</i> , <i>rubru</i> Ibrahim (signed by the debtor).	Amounts to an acknowledgment of liability.	Anderson and Rattigan JJ.
119 P. R. 1908. ²⁵ <i>Sarkhat kar ditte</i> . <i>Baqi dena raha</i> . <i>Tarikh ek</i> January . . . <i>Daskhat</i> Roda Ram, <i>tilas laga ditte</i> . . . <i>lene</i> Pala Mal. (84) 8 Bom. 405, <i>Ranchhoddas</i> <i>Nathrubhai v. J. Khushalchand</i> . ³⁶	A mere acknowledgment of liabi- lity.	Rattigan and Shah Din JJ.
<i>Baqi dewa</i> (balance due) found after com- parison by the hands of Jai Chand.	Did not amount to a promise to pay.	Sir Charles Sargent C. J. and Haridas J.
22 Cal. 757. ⁸ ^d Advance through self in cash Rs. 75. This amount is taken by me as loan. I shall pay interest at the rate of Re. 1 per cent. per mensem. Witnessed by . . .	Mere mention of rate of interest and attestation by witnesses does not convert an acknow- ledgment into a bond. No docu- ment can be a bond unless it creates by itself an obligation to pay the money.	Sir W. Comer Petheram C. J. and Beverley J. ^j
54 All. 506. ¹⁸ <i>Baqi dena raha miti</i> . . . <i>tain hisab kar ke</i> (Signed by the two debtors).	Mere acknowledgment not suffi- cient for the purposes of S. 25 (3), Contract Act.	Mukerji and Bennet JJ.
52 Bom. 521. ¹⁵ <i>Baqi dewa</i> (i. e., balance due).	No express promise to pay under S. 25 (3), Contract Act.	Patkar and Baker JJ.
A. I. R. 1929 Cal. 444. ³⁵ I remain liable to . . . for the sum of . . .	No express promise to pay. Mere admission of liability and declaration of indebtedness.	Suhrawardy and Jack JJ.

Authority; Entry.	Decision.	Judge or Judges.
A. I. R. 1934 Nag. 273. ¹⁹ Rs . . . found due this day on making accounts of old khata balance and promissory note dated. . . .	Bare acknowledgment under Art. 1, Sch. 1, Stamp Act.	Staples A. J. C.
A. I. R. 1935 Nag. 221. ²⁰ <i>Rupaiya dena baqi qabul hai.</i>	Not sufficient under S. 25 (3).	Subhedar A. J. C.
34 P. L. R. 417. ⁵ <i>Lekha paya Ballu ke . . . rupaye baqi rahe. . . angutha Ballu ka. Ek anna tikat . . . Ugahi Atma Ram.</i>	Acknowledgment and not a bond in spite of attestation.	Bhide J.
38 P. L. R. 269. ⁷ Acknowledgment of debt signed by the debtor and attested by two witnesses.	An implied obligation cannot convert an acknowledgment into a bond.	Jai Lal and Sale JJ.
41 P. L. R. 878. ¹² <i>Lekha paya Rahm Ali ka. Baqi rahe lene zabani . . . nishan angutha Rahm Ali.</i>	Promise to pay not expressed in unequivocal terms.	Din Mohammad J.
A. I. R. 1938 Lah. 234. ²⁹ <i>Hisab Yaddasht Lachhman Das. . . sud bahisab fisadi . . . mugarrir kiya gaya. bahaq Shanti Parkash . . . tahrir kar diya. Mubligh . . . bagaya hisab mandarja bala tahrir kiya gaya hai. Ticket lagaya gaya. Lachhman Das bagulm khud.</i>	Contains a promise to pay within the meaning of S. 25 (3), Contract Act.	Coldstream, Dalip Singh & Din Mohammad JJ. (F. B.).
A. I. R. 1938 Lah. 503. ¹³ <i>Mubligh baqi dene. Pichhla hisab samajh liya Mubligh. baqi dene mushtarka ham donon bhayon ko hai.</i>	Amounts to an agreement and is liable to be stamped as such. If attested amounts to a bond.	Tek Chand and Dalip Singh JJ.
17 Lah. 1. ² Debited to Fattu barber. Details of articles sold. Thumb-mark of Fattu.	Neither an agreement or memo of agreement under Art. 5 nor an acknowledgment of debt under Art. 1.	Tek Chand, Dalip Singh and Rangi Lal, JJ. (F. B.).
A. I. R. 1931 Lah. 631. ⁴ Unconditional acknowledgment made by the debtor.	Amounts to an agreement. Further explained in (Note) 17 Lah. 1. ²	Harrison and Tek Chand JJ.
('33) 20 A. I. R. 1933 Lah. 209 : 141 I. C. 617 : 34 P. L. R. 430, <i>Mukhi Lal Chand v. M. Gul Muhammad.</i> ³⁷	Mere acknowledgment does not contain any distinct promise to pay.	Bhide J.
A. I. R. 1938 Lah. 511. ⁶ <i>Baqi rahe lene lakha kar ke.</i> Signed by the debtor.	Is an agreement. <i>Note.</i> —Mainly relying on A.I.R. 1931 Lah. 631 ⁴ on the ground that that judgment was approved in 17 Lah. 1. ² which it was not.	Jai Lal J.
33 P. R. 1882. ³¹ Rupees 56 balance remains. Money to be received bearing interest. Rs. 28 to be received in the spring of Jeth . . . signed by the debtor.	Entry amounted not only to acknowledgment of a subsisting liability but to a promise to pay the two items.	Plowden and Barkley JJ.
72 P. R. 1879. ³⁰ Balance Rs. . . . 1 per cent. per mensem fixed as interest . . . signed by the debtor.	Entry contains a promise to pay the balance with interest.	Plowden and Fitzpatrick JJ.
35 P. R. 1903. ²² <i>Lekha paya Ganda miti Jeth Rs. 948 baqi lene Ganda Pason, bias sainkra do rupya ik robkari Jhaba Singh . . . robkari Mehtab Singh Mohar Nambardar.</i>	The instrument is a bond.	Clark Reid and Harrison JJ. (F. B.).

Authority; Entry.	Decision.	Judge or Judges.
102 P. R. 1905. ²⁴ <i>Bais tahrir anki mubligh . . . az sare nau hisab karke babat hisab bala jo ki hamrah mere jimma baki raha hai, lehza yeh chand kalme bataur sanad likh deta hun ki sanad rahe aur waqt hajit kam aye.</i>	Entry constitutes a promise to pay.	Robertson and Rattigan JJ.
135 P. W. R. 1910. ³³ Distinct promise to pay interest.	Amounts to a bond.	Rattigan J.
3 Lah. 326 : ('22) 9 A.I.R. 1922 Lah. 425 : 69 I. C. 502, <i>Nand Lal v. Partab Singh</i> . ³⁸ After scrutiny of the accounts We have struck a debit balance against ourselves of Rs on account of advances and losses of every kind. Interest to pay at the rate of Rs. 0-7-6 per cent.	Entry was a promise to pay.	Le Rossignol and Martineau JJ.
5 Lah. 406 : ('25) 12 A.I.R. 1925 Lah. 75 : 84 I. C. 524, <i>Narain Das v. Miran Baksh</i> . ³⁹ Entry not containing express promise to pay the principal but makes mention of interest being payable at the <i>sahukara</i> rate.	Entry implies a promise to pay the principal and is a bond.	Martineau and Moti Sagar JJ.
A. I. R. 1932 Lah. 470. ²⁷ <i>Tin hazar rupaya babat nuksan dene.</i>	The words express a definite promise to pay.	Harrison and Addison JJ.
119 I. C. 417. ⁹ Balance struck. Amount carrying interest at the rate of 1 per cent. per mensem.	Unconditional acknowledgment. Implies a promise to pay.	Dalip Singh J.
16 Lah. 258. ³⁴ Rupees . . . <i>Lekhe baqi dewne kite . . .</i>	Words can be construed as a promise to pay.	Bhide and Din Mohammad JJ.
33 Cal. 1047. ¹ For the last five years he had open and current accounts with the deceased.	The respondent acknowledged his liability to pay his debt if the balance could be ascertained against him.	
10 Lah. 748. ¹¹	Followed 33 Cal. 1047. ¹	Sir Shadi Lal C. J. and Skemp JJ.
41 P. L. R. 194. ²⁸ <i>Hisab Surja bania baqi lene rahe miti Phh . . . rupaya baqi anki . . . daskhat Surja, upar ke likhe sahi.</i> Signed by the executant in the following words.	Entry amounts to an agreement.	Tek Chand J.
English Reports Kings Bench 999—Case No. 277. I do hereby acknowledge I owe you.	At p. 1000. The word 'oblige' is not necessary to make a bond, for if one under hand and seal acknowledges himself 'indebted' it is enough to bind him.	Holt C.J. and Powell J.; Powys J. dissenting.

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YOUNG C. J. AND SALE J.

Mohammad Ishaq Madari — Convict
Appellant

v.

Emperor.

Criminal Appeal No. 546 of 1941, Decided on 11th July 1941, from order of Sess. Judge, Delhi, D/- 24th April 1941.

(a) Criminal trial—Evidence — Identification parade—Witness identifying accused as murderer—In committal proceedings witness stating inability to identify accused in Court due to lapse of some months—Accused only tendered before Sessions Court—Prosecution not calling witness in Sessions Court to prove aforesaid facts — Fact that witness identified accused at parade held could not be considered.

The prosecution witness was called to the identification parade and duly identified the accused as the murderer. During the committal proceedings however, the witness stated that as some months had elapsed, he was then unable to identify the accused in Court. Accordingly he was only tendered before the Sessions Court which assumed that the witness had in some way 'resiled.'

Held that owing to the failure of the prosecution to call the witness before the Sessions Court and to allow him to prove the above-mentioned facts, the fact that the witness identified the accused at the identification parade could not be taken into consideration.

[P 61c]

(b) Criminal trial—Evidence—Statement by witness to police—Method of proof.

For the purpose of proving the statement by a witness to a police officer the Court should insist on the production of the writer himself, when available, as the normal method of proof of such statement.

[P 61e]

(c) Penal Code (1860), Ss. 147, 149 and 302—Muslim crowd constituting unlawful assembly with object of obstructing Hindu processionists led by police Sub-Inspector—Muslim crowd throwing stones at processionists and doing other acts of violence—One of crowd stabbing Sub-Inspector—Accused participating in throwing stones held guilty under S. 147 and not under S. 149 read with S. 302.

The Muslim crowd constituting an unlawful assembly with obstruction of Hindu processionists as its common object, threw stones and committed other acts of violence. One of the crowd stabbed the police Sub-Inspector, who was leading the Hindu procession, with a knife. The accused were shown to have participated in throwing stones at the processionists :

Held that the accused were guilty under S. 147 only for the acts which they were proved to have committed in prosecution of the common object of the unlawful assembly, that is to say, of throwing stones at the procession. They could not be held constructively liable under S. 149 read with S. 302 for the murder of the Sub-Inspector since the stabbing of the Sub-Inspector was an isolated act, by an individual rioter; and it could not be said that the other members of the unlawful assembly knew it to be likely that the stabbing of the Sub-Inspector would be committed in prosecution of the common object.

[P 64d,e]

Main Abdul Aziz and Iftikhar-Ul-Haq —

for Appellant, e

M. Sleem, Advocate-General — for the Crown.

Sale J.—Five persons were committed for trial to the Court of the learned Sessions Judge, Delhi, charged under Ss. 302, 325, 323 read with Ss. 149, 147, Penal Code, for participating in a riot on 26th August 1940 in the course of which Sub-Inspector Amar Singh was murdered by stabbing. The learned Sessions Judge acquitted two; and convicted Mohammad Ishaq under Ss. 302, 147, 325 and 323/149, Penal Code, and Abdullah and Abdul Rahman under Ss. 302/149, 147, 325 and 323/149, Penal Code. He held that Mohammad Ishaq was proved to have stabbed f the Sub-Inspector and therefore sentenced him to death. The other convicts were sentenced to transportation for life. From these convictions and sentences the convicts have appealed and the death sentence passed on Mohammad Ishaq is before us for confirmation.

The riot took place while a janam ashtami procession organised by the Sanatan Dharam Sewak Sang and consisting of some 400 or 500 Hindus, was passing at about 9.30 P. M. a mosque known as Bhandanian, situated in a Mohalla in Delhi near Paharganj police station. A license had been granted to the g processionists on condition that no music should be played within 50 yards of the mosque, during prayer time. Sub-Inspector Amar Singh the deceased, with a posse of police had been deputed to accompany the procession to maintain order, and it is in evidence that he was leading the procession. No untoward incident occurred until the head of the procession reached the Bhandanian mosque. As it was 9.30 P. M. and therefore deemed to be after prayer time, the procession was passing with drums beating and flutes playing. In front of the Bhandanian mosque a crowd of about 100 Muslims was collected who objected to the music and demanded that the Sub-Inspector should stop it. The Sub-Inspector told the Muslims that there was no force in their objection because prayer time was over. It appears that the Muslim crowd adopted an obstructive attitude and the Sub-Inspector is alleged to have placed his hand on the revolver and threatened to shoot. A few Muslims advanced from the main crowd in front of the mosque and from among them one is alleged to have bared his breast in front of the Sub-Inspector and challenged him to shoot. This person was identified by some of the prosecution witnesses to have been the accused Abdul

^a Shakoore, one of the two accused acquitted by the learned Sessions Judge. The appellant Mohammad Ishaq, another member of this advance body, came round behind the Sub-Inspector and is said to have stabbed him from behind on the right side of the abdomen, inflicting a fatal injury from which the Sub-Inspector died within a few hours. The other two appellants, Abdullah and Abdul Rahman, are alleged to be among the Muslims who indulged in stone throwing which caused injuries (including some grievous) to a number of the Hindu processionists.

None of the accused was arrested on the spot. A report of this occurrence was immediately made to the police station by a constable but no assailants were named therein. A number of senior police officers collected and it was found that 17 Hindus had been injured with brick-bats, eight of whom have appeared as witnesses. They were all taken to the police station and sent from there to the Irwin Hospital where they were medically examined on the 27th morning. The investigation started as promptly as possible. The statements of some of the eye-witnesses were recorded by the police on the 27th evening. Amongst these witnesses was Devi Parkash (P. w. 7), one of the injured processionists; and it has been proved that he supplied to the police the clue which led them to arrest Mohammad Ishaq as the murderer of the Sub-Inspector. This information was in the hands of the police by 8 P. M. on the 27th evening. Lala Dina Nath (P. w. 40) who was the Inspector in charge of the investigation deputed certain officers to find Mohammad Ishaq but he was not arrested until the afternoon of 2nd September. The other two appellants were arrested on 31st August.

The main points for decision in this case are whether Mohammad Ishaq appellant has been satisfactorily identified as the murderer ^a of the Sub-Inspector and whether the other two appellants have been identified as participating in this riot. So far as the appellant Mohammad Ishaq is concerned, the evidence against him consists of his having been named by Devi Parkash (P. w. 7) who alleges that he knew him beforehand, and of his having been identified as the murderer of the Sub-Inspector by a number of eye-witnesses at two identification parades. The first identification parade was held at 4.30 P. M. on 3rd September by Chaudhri Mushtaq Ahmad, an Honorary Magistrate, at which Mohammad Ishaq was identified as the man who stabbed the Sub-Inspector by (in addition to Devi

Parkash) Sohan Lal (P. w. 8), Bal (P. w. 9), Banarsi Das (P. w. 11) miri Lal (P. w. 12). He was also by police constable Gordhan Singh who was on duty with the proc was only tendered for cross-examination the Sessions Court and has not been upon by the learned Sessions Judge. A second identification parade was held on 10 September by Mr. Tandon, Magistrate, at which Mohammad Ishaq was identified as the murderer by P. w. 10 Kishan. All these witnesses (except Police Constable Gordhan Singh) have given evidence before the Sessions Court identifying Mohammad Ishaq as the murderer of the Sub-Inspector. In addition Devi Parkash (P. w. 7) has testified that he had known Mohammad Ishaq for some years by name and by appearance and that he recognized him as the man who murdered the Sub-Inspector. Of these witnesses Parkash, Bakhshi Ram and Kishan were injured. A number of other witnesses, also injured, have come forward to give evidence as to the course of events but were unable to identify any of the accused. Amongst these witnesses is one Kishan (P. w. 28). He states that he was quite close to the Sub-Inspector when the latter was stabbed and caught him but on being hit by a stone, ran away. A witness however says that he did not usually see the blow struck at the Sub-Inspector and he was unable to identify the murderer.

There can be no doubt that all the witnesses on whom the prosecution relies for the identification of Mohammad Ishaq as the murderer of the Sub-Inspector, i.e., Devi Parkash (P. w. 7), Sohan Lal (P. w. 8), Bakhshi Ram (P. w. 9), Kishan Chand (P. w. 10), Banarsi Das (P. w. 11) and Kishan (P. w. 12) were among the proc either as members of the organisation or as interested spectators. Mr. Abbot, counsel for the appellants, does not contest this finding. His argument is that in the confusion at the time of the murder it could not have been possible for anyone to identify the assailants so reliably, that the evidence of the identified witnesses is not such as can be accepted and that no reliance should be placed on the identification parades.

Before dealing with the evidence, reference must be made to the testimony of police constable Gordhan Singh, who was tendered for cross-examination at the Sessions trial and was cross-examined. His cross-examination gave some account

a occurrence in the course of which he said that he ran after the murderer who escaped into the mosque, but that he was prevented from following him. The learned Sessions Judge has criticised the evidence of this constable and has remarked that "as he does not appear to have identified the culprit . . . it does not appear that he played any part in the affair." This adverse criticism is, in our opinion, hardly justified. In fairness to foot constable Gordhan Singh it ought to be explained that he was called to the first identification parade held on 3rd September and duly identified Mohammad Ishaq as the murderer (see the evidence of the Magistrate b who held the identification parade). During the committal proceedings however Gordhan Singh seems to have stated, reasonably enough, that as some months had elapsed, he was then unable to identify Mohammad Ishaq in Court. Accordingly he was only tendered before the Sessions Court and the learned Sessions Judge seems to have assumed that the witness has in some way "resiled". The prosecution ought to have called Gordhan Singh before the Sessions Court and allowed him to prove these facts. It would then have been established that Gordhan Singh did in fact identify Moham- c mad Ishaq at the identification parade and it would have been for the Court to decide whether his subsequent failure to identify Mohammad Ishaq in Court some months after the identification parade, together with his explanation for this failure, was reasonable or not. As it is, owing to the failure of the prosecution to prove these facts in the Sessions Court, it is not possible to take into consideration the fact that Gordhan Singh identified Mohammad Ishaq at the identification parade. At the same time, the strictures of the learned Sessions Judge on Gordhan Singh are not, in our opinion, justified.

d We may also draw attention at this stage to an irregularity in the manner of proof of the statements of certain eye-witnesses made to the police. Copies of these statements (eleven in number) were brought on record at the instance of the defence and the learned Sessions Judge accepted as proof the evidence of Lala Dina Nath investigating Inspector that they were recorded "under his supervision." In point of fact all these statements were recorded and signed by Sub-Inspector Mansab Ali who is not a witness. It is true that two out of the eleven statements are also signed by Lala Dina Nath, but the other nine do not bear the signatures

of Lala Dina Nath, and Sub-Inspector Mansab Ali should himself, as the writer of these statements, have been called to prove them. In order not to prejudice the appellants we ignore this irregularity and accept the statements as proved. But the learned Sessions Judge should in future insist on the production of the writer himself, when available, as the normal method of proof of such statements.

We now turn to consider Mr. Abdul Aziz's contention that owing to the alleged confusion at the time, no person could reasonably have been expected to identify the murderer and that the identification evidence has been "framed" by the police, and is valueless. f The basis of this argument is that for 24 hours after the occurrence the identity of the murderer was not known to the police, that a clue was provided by the statement of Devi Parkash recorded at 8 P. M. on the 27th evening, that even so, the police did not immediately arrest Ishaq but allowed him to go free till 2nd September, and that after his arrest on 2nd September he was seen by the witnesses before the identification parade. In brief Mr. Abdul Aziz's contention is that a victim for the murder had to be found, that the police unable to trace the right man, decided to concentrate on Ishaq. g

It has been proved that the first clue which the investigating police received as to the identity of the murderer was the statement that Devi Parkash made at 8 P. M. on the 27th wherein he named Ishaq. We will deal with the evidential value of the testimony of this witness later; but there is no force in the argument that the police acted slowly or were for some reason reluctant to effect Ishaq's arrest. There is nothing to show that when Devi Parkash named Ishaq on the 27th evening the investigating police knew where Ishaq lived. The investigating Inspector Lala Dina Nath was not cross-examined on this point. He has, however, h deposed that as soon as he learnt of Ishaq's name, he deputed constables to find him. Ishaq has himself proved in his defence that he was not at his house on the 28th but was attending the Court of the Naib Tehsildar at New Delhi which was some 2 or 3 miles away. There is no reason whatever to suppose that the police could have known then that Ishaq was to be found on the 28th in the Naib Tehsildar's Court at New Delhi. Subsequently, Ishaq admittedly left Delhi for Parbatsar and did not return to Delhi till 2nd September. It seems that the police did receive information that Ishaq had gone

a to Parbatsar, since a constable was sent to arrest him there but without success. Ishaq was in fact arrested at 4 P. M. on the 2nd in a garden at Delhi just after his return, and taken to Sabzi Mandi Police Station. We are satisfied that the police acted in this matter with all due diligence.

We now come to the identification parades. The first parade was held at Delhi Jail on 3rd September at 4-30 P. M. under the supervision of Chaudhri Mushtaq Ahmed Honorary Magistrate. The procedure of the Magistrate has not been criticized and appears to have been perfectly regular. In the course of this identification parade Ishaq is recorded as b complaining to the Magistrate that he had been seen by witnesses while at Sabzi Mandi Police Station. Curiously enough, however, this objection has been thrown overboard in arguments, and counsel has concentrated on trying to show that he had been "shown" to witnesses at Delhi Jail just before the parades, an objection which Ishaq himself never put forward. The relevant facts are that Ishaq, after his arrest on the 2nd afternoon, was immediately taken to Sabzi Mandi Police Station, with his face concealed, by Assistant Sub-Inspector Qutab-ud-Din (P. W. 34) as ordered by the investigating c Inspector Lala Dina Nath (P. W. 40). At 8 P. M. Ishaq, who appeared to have some injuries on his person was taken by Assistant Sub-Inspector Quab-ud-Din in a tonga, with his face covered, to Irwin Hospital for medical examination and was brought back at about mid-night, again with his face covered. On the morning of 3rd September Ishaq was transferred to Delhi Jail in a lorry by Lala Dina Nath who says that during the transfer, Ishaq had his face muffled and was properly concealed from public view. He was driven into Delhi Jail about 11-30 A. M.

There is no evidence whatsoever that d Ishaq while in Sabzi Mandi Police Station was seen by any of the identifying witnesses. There is not the slightest indication on the record, from which even an inference might be drawn that Ishaq could have been seen by any identifying witnesses. An application for an identification parade was made on the morning of 3rd September to the Additional District Magistrate, Delhi, and the Additional District Magistrate deputed Chaudhri Mushtaq Ahmad Honorary Magistrate. The investigating authorities, not knowing at what time the Magistrate would hold the identification parade, had instructed the witnesses to be present at the Delhi Jail at about 8 A. M. and there is no evidence that

some of them waited at the Delhi about 10 A. M. by which time it was that the Magistrate would hold it at 4 P. M. and the witnesses were come back at 4 P. M. There is no that any of the identifying witnesses waiting outside the Delhi Jail ga Ishaq was driven into the jail in 11-30 A. M.; and even if there had witnesses still there, they could have had any opportunity of seeing Ishaq he is proved to have been muffled and perly concealed from the public have no reason to doubt that the conditions were duly taken as asserted Dina Nath and the other investigating At the identification parade held afternoon of 3rd September, Ishaq was identified as the murderer by Sohan Lal Bakhshi Ram (P. W. 9), Benarsi Das and Kashmiri Lal (P. W. 12). Dev (P. W. 7) also identified Ishaq at the same time volunteered that, as he had known him for some years past

The second identification parade was held on the 5th by Mr. Tandon, Magistrate, which Ishaq was identified as the murderer by Kishen Chand (P. W. 10). No arguments were addressed to us on the second identification parade. I suggested that the identification of the appellant was facilitated by one of the injuries, viz., a contusion on the forehead of the head, three inches above the eye. Such a contusion would be protected and would hardly be visible to an identifying witness, especially as Ishaq was (as is proved by the evidence of the Magistrate in charge of the parade) to have taken the precautions which he thought necessary to safeguard himself. There is therefore no force in this argument. We see no force for the criticism advanced regarding the identification parades. We reject the contention that Ishaq was shown to any of the witnesses before the parade either at Sabzi Mandi Police Station or at the Delhi Jail; and we are satisfied that every reasonable precaution was taken to prevent the identifying witnesses from seeing Ishaq before the parades.

We will now deal with the contention that owing to the alleged confusion at the time of the stabbing of the Sub-inspector, no eye-witnesses could reasonably be expected to identify the assailant. It is proved that the occurrence took place at 9-30 P. M. on the 2nd September. We are satisfied that there was sufficient time to enable the witnesses to enable the assailant to be seen.

a was lit by electric standards and there was an electric standard some 20 or 30 yards away from the scene of the occurrence. But apart from this it is common ground that the processionists were carrying a large number of incandescent lamps, as is usually done on these occasions. There was, therefore, ample light to enable the assailant to be identified. There might have been some force in Mr. Abdul Aziz's contention regarding the difficulty of identification, had there been evidence to show that at the time of the incident there were a large number of excited Muslims pressing round the Sub-Inspector one of whom suddenly whipped out b a knife and stabbed him. In such circumstances it might have been difficult for a spectator to say with any certainty, who the assailant was. But the evidence is otherwise.

It is said there were about a hundred Muslims collected outside the mosque. Out of these a small body stepped forward—the number is variously given as about 5, 7 or 9. Out of this body two emerged into prominence. One stepped in front of the Sub-Inspector, bared his breast and challenged the Sub-Inspector to fire at him. This man was identified by some of the witnesses as c the accused Shakoor, but the learned Sessions Judge has given Shakoor the benefit of the doubt and acquitted him. Another man from among this small advance body of Muslims, stepped round behind the Sub-Inspector and stabbed him with a knife from behind. It is clear, therefore, that there was no such crowd pressing round the Sub-Inspector at the time, as would prevent those of the processionists who were near by, from identifying the assailant. All the identifying witnesses say they were near the Sub-Inspector at the time. It is true that the processionist who seems to have been nearest to the Sub-Inspector—the witness Maharaj d Kishan, who says that he at first supported the Sub-Inspector as he fell but afterwards released him because he was himself hit by a stone and ran away—failed to identify the assailant at the parade. But Maharaj Kishan (P. W. 28) while generally supporting the prosecution version says that he did not actually see the blow struck, and it may well, therefore, be that he did not notice the assailant. The fact that this witness failed to identify Mohammad Ishaq shows conclusively that the identification parades were conducted honestly, otherwise, as the nearest to the deceased, he certainly would have been assisted to identify Ishaq. There is no

reason, therefore, why the assailant should not have been identified.

No suggestion has been made, either in cross-examination or in arguments, that any of the identifying witnesses or the investigating police, had any motive to implicate Ishaq falsely. The contention that the eye-witnesses, are "interested" is based, not on the fact that they had any motive to implicate any particular Muslim falsely, but merely on the fact that, as Hindus, and members of the procession, who live in the same locality, they are anxious to find a victim. There is no force in this argument. The first identification parade was held as soon as possible after Ishaq's arrest, under circumstances, which, as we have already shown, are above criticism. Some of the witnesses, such as Maharaj Kishan, did not identify Ishaq, a fact which in our view, as previously noted, tends to strengthen our faith in those witnesses who did succeed in identifying Ishaq.

As regards the witness Devi Parkash (P. W. 7), his testimony has been attacked on the ground that if, as he now says, he knew Ishaq by name and by sight before this occurrence and identified Ishaq as the murderer, it is difficult to understand why he should have made no mention of this fact g —as he himself admits—to anybody until his statement was recorded by the police 24 hours after the occurrence. It is no doubt true that it was Devi Parkash's statement which gave the police the first clue to the identity of the murderer, and there is no doubt that Devi Parkash was in the procession; but his silence for 24 hours does lead to the reasonable inference, either that Devi Parkash did not know the name of the assailant at the time, and that he is telling an untruth when he says that he had known him by name and by sight for five or six years; or that if it is true that he had known Ishaq for five or six years, he did not identify h him as the assailant. It is not improbable that Devi Parkash is not speaking the truth when he says that he had known the murderer by name and by sight for five or six years. In all probability he learnt his name after the murder; and has added the other information in order, as he mistakenly supposes, to strengthen his evidence. In any case, a reasonable doubt is cast on his veracity and we think it safe therefore not to place any reliance on his testimony. But there is no reason whatsoever to doubt the testimony of the other identifying witnesses, Sohan Lal, Bakhshi Ram, Benarsi

^a Das, Kashmiri Lal and Kishan Chand. We have carefully considered the evidence of these witnesses and we have come to the conclusion that their identification of Ishaq as the murderer was made in good faith, and in the circumstances of this case, establishes beyond doubt that Ishaq was the assailant who stabbed the Sub-Inspector in the abdomen and thereby caused his death. We hold therefore that he has been rightly convicted under S. 302, Penal Code.

The other two appellants, Abdul Rehman and Abdullah, have been identified as being amongst the Muslims who threw stones at the Hindu procession. No other part is attributed to them in connexion with the murder of the Sub-Inspector. They were duly identified by a number of witnesses at two identification parades as amongst the stone-throwers; and Mr. Abdul Aziz on behalf of the appellants has not advanced any arguments, other than those already noticed, for doubting their identification as amongst the stone-throwers. The question however arises (1) whether they participated, as found by the learned Sessions Judge, in a riot, and (2) whether, if so, they are constructively guilty under S. 149, Penal Code, with Ishaq for the murder of Sub-Inspector Amar Singh.

^c We are of opinion that all those persons, identified as amongst the Muslim crowd, who actually obstructed the procession and threw stones at it or committed any other acts of violence, were members of an unlawful assembly, the common object of which was to obstruct the procession. All such persons, whose participation has been established are, therefore, guilty under S. 147, Penal Code; for this reason we hold that Ishaq, the murderer, as well as Abdul Rehman and Abdullah have been rightly convicted under S. 147, Penal Code.

^d But the common object of the assembly was to obstruct the procession; and we do not consider that persons other than Ishaq, who are proved to have participated in this riot, are constructively liable under S. 149, Penal Code, for the murder of the Sub-Inspector. The stabbing of the Sub-Inspector appears to have been an isolated act, by an individual rioter; and it is not possible to hold that the other members of the unlawful assembly knew it to be likely that the stabbing of the Sub-Inspector would be committed in prosecution of the common object. It is true that when a procession, taken out by members of one community duly licensed and led by a police officer, is obstructed by members of the other community, there is

always a possibility, if not a probability, of a riot. But it would be extending the scope of S. 149, Penal Code, too far, to impute to any of the obstructionists, who confine themselves to stone throwing, the knowledge that one of their members would be likely to whip out a knife and go to the length of stabbing the police officer in charge of the procession. Under these circumstances, we are of opinion that Abdullah and Abdul Rehman cannot be held constructively guilty under S. 302 read with S. 149, Penal Code. They are guilty only of the acts which they are proved to have committed in prosecution of the common object of the unlawful assembly, that is to say, of throwing stones at the procession. It has been established that some of these stones caused grievous (though fortunately not serious) injuries. We therefore find Abdullah and Abdul Rehman guilty under S. 147 read with S. 325 and S. 323, Penal Code.

We accordingly accept the appeal of Abdullah and Abdul Rehman to the extent of acquitting them under S. 302 and setting aside their sentences of transportation for life. But we maintain their conviction under Ss. 147, 325 and 323, Penal Code. It appears that they have been in jail since the date of their arrest on 31st August, i. e., nearly eleven months. We consider that this is sufficient punishment and we reduce their sentence therefore to the period already undergone. As regards Ishaq, whose conviction under S. 302 we have maintained, we confirm the sentence of death and dismiss his appeal.

G.N./R.K.

*Order accordingly.***A. I. R. (29) 1942 Lahore 64**

TEK CHAND J.

*Mt. Barkat Bibi — Plaintiff —**Petitioner —*

v.

Nazir — Defendant — Respondent.

Civil Revn. Petn. No. 176 of 1941, Decided on 26th June 1941, for revision of order of Senior Sub-Judge, Ludhiana, D/- 29th May 1940.

(a) Civil P. C. (1908), Ss. 2 (2) and 107 (2)—
Appeal—Order rejecting memo for non-payment of deficit court-fee is decree and is appealable as such.

An order of an appellate Court dismissing the memorandum of appeal for non-payment of deficit court-fee is a decree and is appealable as such: ('27) 14 A.I.R. 1927 Nag. 100 and ('22) 9 A.I.R. 1922 Pat. 281, *Rel. on.* [P 65c, d]

(b) Practice — Appeal — Revision can be treated as appeal provided filed within limitation.

An incompetent petition for the revision of an order can be treated as a memorandum of appeal provided the revision petition was presented within 90 days from the date of the order. [P 65e]

Partap Singh — for Petitioner.

Abdul Karim — for Respondent.

Order. — The plaintiff-applicant instituted a suit for possession of certain property, valuing it at Rs. 100 for purposes of jurisdiction and court-fee. On objection by the defendant that the suit had not been properly valued, the Court found that the market value of the property was Rs. 1900 and ad valorem court-fee on that amount should be paid. The plaintiff, accordingly, amended the plaint and paid the deficient court-fee. The suit was then tried on the merits but was dismissed. The plaintiff preferred an appeal to the Senior Subordinate Judge, valuing the appeal at Rs. 100 and paying court-fee on that amount only. At the hearing the respondent objected that the court-fee paid was insufficient. The appellant admitted that the proper court-fee had not been paid and expressed her willingness to make good the deficiency. The Court allowed the plaintiff-appellant to pay the deficit court-fee by 29th May 1940. On that date, neither the appellant nor her counsel was present, nor had the deficiency in court-fee been made good. The learned Judge noted these facts and rejected the appeal with costs. About eleven months later, on 24th March 1941 the plaintiff preferred a petition for revision in this Court from the order of the Senior Subordinate Judge dated 29th May 1940 rejecting her appeal.

A preliminary objection is taken that the revision is not competent, as the order of the Senior Subordinate Judge rejecting the appeal for non-payment of court-fee amounted to a decree and therefore was appealable as such. This objection is well founded and must succeed. Section 2 (2), Civil P. C., lays down that an order rejecting a plaint shall be deemed to be a decree. Under S. 107 (2), the appellate Court has the same powers and performs as nearly as may be the same duties as are conferred, and imposed, by the Code on Courts of original jurisdiction in respect of suits instituted therein. The order of the appellate Court dismissing the memorandum of appeal for non-payment of deficit court-fee is therefore a decree and is appealable as such: *see* A.I.R. 1922 Pat. 281¹ and A.I.R. 1927 Nag 100.² Mr. Partap Singh had

1. (22) 9 A.I.R. 1922 Pat 281 : 63 I.C. 99:3 P.L.T. 117 : 6 Pat.L.J. 625, Suraj Pal v. Utim Pandey.
2. (27) 14 A.I.R. 1927 Nag. 100 : 98 I.C. 663, Govinda v. Bansi Lal.

no answer to the objection and asked me to treat the petition for revision as a memorandum of appeal. I might have acceded to this request, if the petition for revision had been presented within 90 days of the order, but as stated above, the order of the Senior Subordinate Judge was passed on 29th May 1940 and the petition for revision was not presented till 24th March 1941. No sufficient cause has been shown for condoning this long delay. The petition for revision fails and is dismissed with costs.

G.N./R.K.

Petition dismissed.

A. I. R. (29) 1942 Lahore 65

DIN MOHAMMAD J.

Mt. Zabida Bibi —

Plaintiff — Appellant
v.

Mt. Zenab Bibi and others —

Defendants — Respondents.

Second Appeal No. 120 of 1941, Decided on 6th June 1941, from decree of Senior Sub-Judge, Hoshiarpur, D/- 21st October 1940.

Mahomedan law—Debts of deceased—One of co-heirs in possession of deceased's property selling same for discharging his debts — Sale cannot bind other heirs or creditors — Suit by heir in actual possession for declaration that sale of his share to which he was not party is illegal—Suit can be decreed without calling upon plaintiff to pay his proportionate share of deceased's debt.

Where one of the co-heirs of a deceased Mahomedan, in possession of the whole or part of the estate of the deceased, sells property in his possession forming part of the estate for discharging the debts of the deceased such sale is not binding on the other co-heirs or creditors of the deceased : ('18) 5 A.I.R. 1918 Mad. 1049 (F.B.) *Foll.* ; *Case law discussed.* [P 67e]

If an heir in actual possession of the property merely seeks a declaration that the alienation effected in respect of his share without joining him in the transaction is illegal, he cannot be called upon to pay a proportionate share of the debts of the deceased as a condition precedent to his suit being decreed. [P 68a,b]

Syed Mohsin Shah — for Appellant.

Sardar Nihal Singh — for Respondent 4 (Gujar Mal).

Judgment.—This appeal has arisen out of a suit instituted by one Mt. Zubeda Bibi, a minor daughter of Hashmat Ali against Mt. Zenab Bibi, Mt. Khairan, Abdul Rehman and Gujar Mal, for a declaration that she was the owner of one-half of the house originally belonging to Hashmat Ali and that her share was not liable to sale in execution of any decree obtained by Gujar Mal against the other defendants. The facts are these. One Hashmat Ali, who owned the

a house in suit, died leaving him surviving his only daughter, the plaintiff, and the defendants 1 to 3. Defendants 1 and 2 mortgaged the entire house to Gujar Mal who subsequently obtained a decree for the sale of the mortgaged property in execution of which the whole house was sought to be sold. The suit was resisted solely by Gujar Mal who raised all sorts of frivolous objections in defence. For example, it was contended that the plaintiff was not the daughter of Hashmat Ali and even if she was she could not succeed to the property left by him as the family was governed by custom. It was further denied that the house ever belonged to Hashmat Ali. Issues were framed on all the points raised by Gujar Mal but the dispute centred on the question whether the mortgage effected by defendants 1 and 2 was binding on the plaintiff. All other issues were given up. The trial Judge came to the conclusion that the alienation in question did not bind the plaintiff, but holding that the alienation had been effected in order to discharge the debts owed by Hashmat Ali to Gujar Mal and that the debts were a first charge on the property of a Musalman, he gave a declaration to the plaintiff subject to the payment by her of Rs. 850. The plaintiff appealed to the Senior Subordinate Judge but he also confirmed the decision of the Court below. Hence this appeal.

The only question involved in this case is whether the Courts below were justified in tacking the condition on to the decree granted to the plaintiff. The Senior Subordinate Judge has relied upon A.I.R. 1927 ALL. 415,¹ 64 I. C. 410,² 53 I. C. 721,³ 61 I. C. 947,⁴ A.I.R. 1925 Lah. 509⁵ and A.I.R. 1931 Lah. 221,⁶ but, in my view, none of these judgments helps the respondent. In A.I.R. 1927 ALL. 415,¹ Dalal and Pullan JJ. observed that where the heirs of a deceased Musalman, who were in actual possession of the estate, executed a mortgage for a debt due by the deceased, the mortgagee was entitled to enforce the mortgage against the whole estate including

1. ('27) 14 A.I.R. 1927 All. 415 : 100 I. C. 661, Abdul Aziz Khan v. Muhammad Husain.
2. ('20) 7 A.I.R. 1920 L. B. 155 : 64 I. C. 410, 10 L. B. R. 389, Maherunessa v. P. D. C. Pereira.
3. ('19) 6 A.I.R. 1919 Oudh 232 : 53 I. C. 721, Ahmad Shah v. Abdul Samad.
4. ('20) 7 A.I.R. 1920 All. 323 : 61 I. C. 947 : 42 All. 497 : 18 A. L. J. 613, Muhammad Junaid v. Mt. Aulia Bibi.
5. ('25) 12 A.I.R. 1925 Lah. 509 : 85 I. C. 772, Jhanda v. Sapuran Singh.
6. ('31) 18 A.I.R. 1931 Lah. 221 : 134 I. C. 776 : 82 P. L. R. 157, Anwar Hussain v. Ibrahim.

the shares of the heirs who did not join in the execution of the mortgage and who were not in possession. Apart from the fact that the principle enunciated in this judgment did not apply to the present case inasmuch as here it was practically conceded that Mt. Zubeda Bibi was in actual possession of the house, this judgment was later considered by another Division Bench of the same Court composed of Niamatullah and Harries JJ. in A.I.R. 1938 ALL. 182⁷ and was adversely commented upon. In fact, even the basic decision as reported in 7 ALL. 822⁸ was distinguished. The learned Judges in the course of their judgment observed :

Indeed, it might well be argued on some other occasion that the decision in A.I.R. 1927 All. 415¹ is in conflict with the undoubted rule that the heirs in actual possession of a deceased Mohammedan's property do not represent the whole body of heirs and that their acts are not binding on the other heirs who have not assented to any particular transaction. In A. I. R. 1927 All. 415,¹ it was undoubtedly held that a mortgage by some of the heirs of a deceased Mahomedan bound the shares of other heirs who were out of possession and who were not parties to the mortgage and this view may have to be reconsidered in a proper case.

In 64 I. C. 410,² Maung Kin J. observed that the widow of a deceased Mahomedan, who is in possession of his entire estate, might be sued alone for debts due from the estate without joining the other heirs as parties to the suit, and if in order to satisfy a decree passed in such a suit, the widow transferred any portion of the estate, the transferee got a good title to the property and the other heirs of the deceased could not challenge the transfer. Here again 7 ALL. 822⁸ was followed. I may say with all respect that this decision too is distinguishable and is further not based on any sound principle of Mahomedan law. In 53 I. C. 721³ decided by Kanhaiya Lal J. the head-note reads as follows :

A voluntary alienation by some of the heirs of a deceased Mahomedan in possession of the estate, for the purpose of paying the debts of the deceased, is not binding upon the co-heirs who do not join in making the alienation, but in view of the provision of the Mahomedan law that the payment of debts takes precedence over the inheritance, such an alienation can only be set aside on condition of the claimants paying their share of the debt due by the person through whom they claim title which has been discharged by the sale.

In 61 I. C. 947,⁴ Sir P. C. Banerji and Tudball JJ. remarked that where part of an estate is sold by certain heirs and the debts

7. ('38) 25 A.I.R. 1938 All. 182 : 174 I. C. 651 : 1937 A. L. J. 1320 : I.L.R. (1938) All. 167, Phool Chand v. Mt. Mantia.
8. ('85) 7 All. 822 : 1885 A. W. N. 248 (F.B.), Jafri Begum v. Amir Mohammad Khan.

due are paid off, the remaining heirs cannot dispute the sale as they are only entitled to a share in what is left over after the debts have been paid. In A. I. R. 1925 Lah. 509,⁵ Moti Sagar J. remarked that a Mahomedan who sued to recover immovable property alienated by his mother as his de facto guardian during his minority is liable to satisfy any ancestral debt to the extent of his share in the assets before he could recover possession of his share in the property. In A. I. R. 1931 Lah. 221,⁶ Sir Shadi Lal C. J. and Coldstream J. observed that a sale of the property of the deceased judgment-debtor after his death by some of his heirs without the intervention of the Court could not be deemed to be a sale in execution of the decree and could not be binding on the minor heirs. It was, however, added that a Court had got the discretion to direct that an heir who was not bound by a sale made for the payment of the debts of the deceased, should pay to the purchaser a proportionate share of the debts, before he could recover possession of the property. It will be observed that in most of these cases the contesting heir was out of possession, while, as stated above, in the present case, the plaintiff does not seek to recover possession of the property but only a declaration that the mortgagors were not competent to dispose of her share in the property of her father. Counsel for the respondent has further relied on a judgment of Tek Chand J. as reported in A.I.R. 1935 Lah 273.⁹ The learned Judge observed that where there has been no distribution of the estate among the heirs, a creditor can sue one of the heirs who is in possession of the whole or any part of the estate without impleading the other heirs as defendants, to recover the entire debt.

It may be observed that the learned Judge himself remarked that there was a divergence of view on this matter in the various High Courts in India and that he leaned towards the Calcutta High Court mainly on the ground that no ruling of this High Court had been brought to his notice. Counsel for the appellant, on the other hand, relies on 40 Mad. 243,¹⁰ 45 Cal. 878¹¹ and A. I. R. 1936 Lah. 943.¹² In 40 Mad. 243,¹⁰ a Full Bench

composed of Abdur Rahim, Spencer and Srinivasa Ayyangar JJ. discussed all the relevant authorities on the subject and came to the conclusion that where one of the co-heirs of a deceased Mahomedan, in possession of the whole or part of the estate of the deceased, sells property in his possession forming part of the estate for discharging the debts of the deceased, such sale is not binding on the other co-heirs or creditors of the deceased. Abdur Rahim J. who wrote the principal judgment, reviewed almost all the authorities available on the subject including 7 ALL. 822^b which had been followed in almost all the authorities relied upon by the respondent and ultimately expressed his opinion in the following words :

So far as voluntary alienations are concerned, which alone form the subject-matter of reference, the Mahomedan law is clear that one of the heirs of a deceased person is not competent to bind the other heirs by his acts.

Srinivasa Ayyangar J., in his concurring note remarked :

My learned brother has shown that there is nothing in the Mahomedan law giving such a right to one of the co-heirs who may happen to be in actual possession of the whole of the ancestor's estate; such possession, it must be remembered, is presumably on behalf of all the co-heirs. He is not constituted the representative of the deceased and cannot administer his property even for the limited purpose of paying off his debts.

In 45 Cal 878,¹¹ their Lordships of the Privy Council in a case in which a widow of a deceased Mahomedan had transferred her share along with the shares of her children in the property of the deceased remarked that she had no power to deal with the minors' shares as she had done, and that only her own share passed under the deed of sale. It was further added that under the Mahomedan law the mother was not a natural guardian of her children and that consequently she had no power to convey to another any right or interest in immovable property which the transferee could enforce against the infant; nor could such transferee, if let into possession of the property under such unauthorized transfer, resist an action in ejectment on behalf of the infant as a trespasser. In A. I. R. 1936 Lah. 943,¹² a Division Bench of this Court composed of Addison and Abdul Rashid JJ. remarked that the doctrine that a minor may be compelled to refund the benefit received by him when any of his transactions is declared to be null and void at his instance is only applicable to suits for possession so far as immovable property is concerned. In a declaratory suit this equitable relief cannot be granted to the

9. ('35) 22 A.I.R. 1935 Lah. 273, Mt. Amir Begam v. Ahmad Jalal Din.

10. ('18) 5 A.I.R. 1918 Mad. 1049 : 40 I. C. 210 : 40 Mad 243 : 32 M. L. J. 195 (F. B.), Abdul Majeeth Khan v. Krishnamachariar.

11. ('18) 5 A.I.R. 1918 P. O. 11 : 47 I. C. 518 : 45 Cal. 878 : 45 I. A. 73 (P. C.), Imambandi v. Mutsaddi.

12. ('36) 23 A.I.R. 1936 Lah. 943 : 187 I. C. 367 : 39 P. L. R. 76, Manak Chand v. Madan Lal.

a vendees because the Court cannot tack on the equitable relief to the declaration sought by the minor plaintiff.

After fully considering the pros and cons of the whole matter, I have come to the conclusion that the decision in 40 Mad. 243¹⁰ is more in consonance with both the letter and spirit of the Mahomedan law and that, if I may say so with all respect, the rulings to the contrary do not lay down good law. I am further of opinion that if an heir is in actual possession of the property and merely seeks a declaration that the alienation effected in respect of his share without joining him in the transaction is illegal, he cannot
b be called upon to pay a proportionate share of the debts of the deceased as a condition precedent to his suit being decreed. If a vendee has a recourse to an unauthorized alienation in order to secure a discharge of his debts, he does so at his own risk. Supposing, a vendee institutes a suit against some heirs only of a deceased Mahomedan and obtains a decree against them, the other heirs who have not been impleaded in time cannot be compelled to contribute towards the debts of the deceased, inasmuch as the statute of limitation comes to their rescue and saves them from being harassed any further. Simi-
c larly, if an alienee allows his debts to be time-barred as against certain heirs who are not asked to join in the alienation effected in his favour by some heirs only, he loses his right on account of lapse of time to realise the proportionate share of the debt from those who have not joined in the transaction. I accordingly allow this appeal, set aside the decree of the Courts below and decree the plaintiff's suit in terms of the relief prayed for. The contesting respondent Gujar Mal will pay the costs of the appellant in all the Courts.

G.N./R.K.

Appeal allowed.

d

*** A. I. R. (29) 1942 Lahore 68**

TEK CHAND AND BLACKER JJ.

Ganesh Flour Mills Co., Ltd., Registered Office, Delhi, Branch at Lyallpur, through its seven Directors and General Manager — Plaintiff — Appellant

v.

Jag Mohan Saran — Defendant — Respondent.

First Appeal No. 96 of 1940, Decided on 7th November 1941, from decree of Sub-Judge, First Class, Lyallpur, D/- 6th March 1940.

* Company — Meeting of directors — No quorum fixed — Acts of major part of directors present at meeting are valid.

It is a cardinal rule of corporation law that a majority of its members is entitled to exercise the powers of the corporation and if a special provision is made, the whole or a part by the major part, but by the majority of those present at a regular corporate meeting. Whether the number present be a majority or not. This rule is equally applicable under the Companies Act, save so far as to the extent of the articles, or the Act itself, exclude it. The same rule applies where a corporation is delegated to a smaller body. There is no construction of the articles of association which leads to the conclusion that they supersede the ordinary rule held that, where no quorum has in fact been obtained, the acts of a major part of the directors are valid : *English cases* r.

[P 6]

M. C. Mahajan and Shamsheer B.

J. N. Aggarwal, Achhru Ram and — for

Blacker J. — On 28th August 1940, Bahadur Seth Mahan Narain, Manager, filed a suit on behalf of Flour Mills Co., Ltd., for damages and injunction against the respondent Jag Mohan Saran. In para. 1 of the plaint it was stated that the suit related to the Lyallpur branch of the company as the General Manager was competent to sign the suit and to sign and verify the principal officer and general agent of the company. The defendant denied the authority of the Rai Bahadur Seth Mahan Narain to file the suit and the jurisdiction of the Court. Accordingly the learned Judge framed issues on both points. The first issue was against the defendant on the jurisdiction. As however he failed to establish the jurisdiction, the appeal was allowed on the other issue, i. e., v. Bahadur Seth Mahan Narain was allowed to file the suit, he passed an order striking off the file of the plaintiff and the record room. In the order the suit is described as 'The appeal before us is against the defendant and is filed by the plaintiff. The respondent does not contest the jurisdiction.'

The evidence on which the learned Judge decided the suit is wholly defective and is, indeed, the only evidence to be considered in this appeal. It appears from an entry in the books of the company that the names of the six gentlemen who were the directors on 14th July 1913 (the date by which the grant of a licence to the Rai Bahadur was shown) were showing that only five directors were present (E. A. No. 75), the power

a itself (E. A. No. 73) and the articles of association. Article 72F is the article which gives the directors the power to file suits and Art. 75 is the article which enabled the board to delegate to the sub-committee of three the authority to execute this power of attorney in favour of the General Manager. The important article however is No. 73. That article gave the board the power to regulate its own business and to fix a quorum. It also laid down the rule of majority decision. It is conceded that at the material time no quorum had been fixed and it is also conceded that only five out of the six directors were present at the relevant meeting. The learned trial Judge has found that no quorum having been fixed, it must be held that no smaller body than the whole body of six could act and that therefore the power of attorney is invalid as the resolution authorising it was invalid. He has however cited no ruling in support of the view of the law which he has taken. Before us no Indian authority was cited by either party and it appears to be necessary to go to the English decisions for guidance. It is stated at p. 235, Edn. 16 of Palmer's "Company Law" that it is a cardinal rule of corporation law that prima facie a majority of its members is entitled to exercise the powers of the corporation. It is further laid down, on the authority of Bacon, that where no special provision is made, the whole are bound not only by the major part, but by the major part of those present at a regular corporate meeting whether the number present be a majority of the whole or not. The following dictum of Lord Hardwicke in (1736-55) 2 Atk. 212¹ is also cited :

It cannot be disputed that whenever a certain number of persons are incorporated, a major part of them may do any corporate act or if all are summoned and part appear, a major part of those that appear may do a corporate act, though nothing may be mentioned in the charter of the major part.

d The rule, according to Palmer, is equally applicable to a company under the Act, save so far as its constitution or articles, or the Act itself, exclude or modify it. The same rule applies where a corporate power is delegated to a smaller body. The first authority cited before us on behalf of the appellant was (1867) 4 Eq. 233.² That was a case of a limited liability company, whose articles laid down no quorum. It was found that though there were six directors the largest number that attended was four and that the usual number was two. The number that

attended the material meeting was two, and the Master of the Rolls (Lord Romilly) held that that was a sufficient quorum. He repelled the suggestion that, in the absence of any stipulation to that effect, it requires the total number to be present. In (1888) 21 Q.B.D. 160³ the rule referred to in Palmer was reaffirmed. The case, however, was not of a limited liability company, but of an ancient corporation whose acts were regulated by its charter and by the general corporation law. In (1867) W. N. 79,⁴ the board had power to fix a quorum but, as in this case, had not done so. The total number of directors was nine. There was an understanding that no business would be done unless three were present. It was held that the acts of three were valid. The Vice-Chancellor, moreover, went on to remark that even if there had been no such understanding the clauses in the association deed providing for the legality of acts done by the board of directors would have been satisfied by only two directors being present to form the board. In (1882) 46 L. T. 296⁵ the remarks of the Lord Chief Justice (Lord Coleridge) and of Brett L. J. appear fully to support the propositions laid down in Palmer.

On the other hand, there appears to us only one case which might be taken as supporting the contrary view. That is (1934) 1 Ch. D. 171.⁶ In that case there is a dictum of Bennett J. which has been cited by the respondent, to the effect that the rule relied upon by the appellant in the present case had no application to companies incorporated under the Companies Act, but is applicable to cases where a corporation is entrusted with a duty of public nature. The proposition, however, if I may say so with all respect, seems to have been rather broadly laid down by his Lordship in view of the authorities to which I have already referred. The judgment itself shows that the decision was based rather on the consideration that in that particular case a construction of the articles themselves led to an interpretation of them contrary to the general rule. There are some remarks in

3. (1888) 21 Q. B. D. 160 : 57 L. J. Q. B. 418 : 36 W. R. 880 : 52 J. P. 580, Mayor & Co. of Merchants of the Staple of England v. Governor and Co. of Bank of England.

4. (1867) 1867 W. N. 79, In re Regent's Canal Iron Co.

5. (1882) 8 Q. B. D. 685 : 51 L. J. Q. B. 257 : 46 L. T. 296:30 W. R. 624, York Tramways Co. Ltd. v. Willows.

6. (1934) 1 Ch. D. 171: 103 L. J. Ch. 47: 150 L.T. 189: 77 S. J. 816 : 50 T. L. R. 44, Perrott and Perrott Ltd. v. Stephenson.

1. (1736-55) 2 Atk. 212, Att. Gen v. Davy.

2. (1867) 4 E. Q. 233, Lyster's case.

a (1890) 59 L. J. Ch. 616⁷ at p. 624 which have been cited on behalf of the respondent, but they refer to the particular case of a sub-committee to which a board has delegated specified functions. A consideration of the above authorities leads me to the conclusion that the rule is as stated in Palmer and that unless a construction of the articles leads to the conclusion that there was an intention to supersede the ordinary rule, it must be held that, where no quorum has in fact been fixed, the acts of a major part of the directors for the time being are valid. I can find no such intention in the present articles. In fact Art. 74 seems to indicate the opposite, b as it clearly contemplates a case in which the board would be acting in spite of the fact that one of them was not present. I would, therefore, hold that the learned trial Judge's decision is wrong on this point and, in that view of the case, it does not seem necessary to deal with any of the other arguments raised on behalf of the appellant. I would accordingly accept this appeal with costs and setting aside the decree of the Court below dismissing the suit, send the case back to it for decision of the further questions that arise in it. The stamp on this appeal will be refunded and the other costs will be c costs in the cause. The parties are directed, through their counsel, to appear before the learned trial Judge on 8th December 1941.

Tek Chand J.—I agree.

K.S./R.K. *Appeal allowed.*

7. (1890) 59 L.J.Ch. 616: 62 L.T. 873:2 Meg. 217, In re Liverpool Household Stores Association Ltd.

* A. I. R. (29) 1942 Lahore 70

FULL BENCH

DALIP SINGH, RAM LALL AND SALE JJ.

Partap Singh — Complainant —

Petitioner

v.

a *Harnam Singh Mangal Singh and others*
— Accused — Respondents.

Criminal Revn. Case No. 1681 of 1940, Decided on 8th July 1941, referred by Young C. J. and Ram Lall J., D/- 29th May 1941.

* Criminal P. C. (1898), S. 439 — Order of acquittal — Revision from, by private complainant on ground that evidence has been misstated by trial Judge — When High Court will order retrial stated.

The powers of the High Court on a revision petition by a private complainant from an order of acquittal are exactly the same as the powers in a Court of appeal conferred by Ss. 423, 426, 427, 428 or S. 338. Under cl. (4) of S. 439, the High Court cannot convert a finding of acquittal into one of conviction, but it can under the powers conferred under S. 423 order the accused to be retried by a Court of competent jurisdiction subordinate to such

appellate Court. In considering the question whether such a retrial should or should not be ordered, the discretion of the Court is legally unlimited. In actual fact however, the Court seldom exercises this discretion except that an order of acquittal will not as a rule be interfered with merely because the High Court disagrees with the finding of the Magistrate. It is only when the record is incomplete or there is a flaw in jurisdiction or where the finding is manifestly wrong or perverse that the High Court will interfere in such cases. Where the evidence has been misstated by the trial Judge it is much the same position as if the Judge, who combines the functions of a Judge and jury, had misdirected himself as to what the evidence was in the particular case. It will be open for the High Court, however, to consider whether in spite of the misdirection, any finding other than one of acquittal would have been come to in the circumstances of the particular case and the High Court would not order a retrial unless it came clearly to the conclusion that but for the misdirection the Court might have or should have come to a different finding to what it actually did : 26 Mad. 1, Ref.

[P 71a,b,c,d]

Panna Lal Bahl — for Petitioner.

Jawala Parshad — for Respondents.

ORDER OF REFERENCE

Young C. J. and Ram Lall J. — The point of law involved in this case is covered by a reference made to a Full Bench (Criminal Appeals Nos. 1805 of 1940 and 1178 of 1940).¹ We consider that this case should also be placed before that Full Bench, for the disposal of the point of law involved. We g order accordingly.

OPINION

Dalip Singh J. — This case has been referred to a Full Bench by a Division Bench on the ground that the point involved in it is covered by the reference so made to a Full Bench in Criminal Appeals Nos. 1805 and 1178 of 1940.¹ But the facts in this case are different and it does not appear to me that the same point is involved at all. In this case the three accused were tried by the learned Additional Sessions Judge, Lahore, under S. 302/34, Penal Code, and were acquitted. A revision petition was put in by the complainant, there being no Crown appeal whatsoever, and in this revision petition it was not asked that the accused should be convicted by the High Court under S. 302 or any other section and sentenced accordingly. All that was asked was that the High Court should go into the evidence and decide whether the learned Additional Sessions Judge had not in acquitting the accused misstated and misinterpreted the evidence and that his finding of acquittal was, on this ground and on others, manifestly wrong and perverse. No question, therefore, arises about the appellate 1. Reported in ('41) 28 A.I.R. 1941 Lah. 465 (F.B.), *Bawa Singh Sawan Singh v. Emperor.*

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BECKETT J.

Pariap Singh — Judgment-debtor

— Appellant

v.

Bhagat Ram — Decree-holder

— Respondent.

Exn. Second Appeal No. 268 of 1941, Decided on 8th July 1941, from order of Senior Sub-Judge, Gurdaspur, D/- 7th November 1940.

(a) *Res judicata* — Execution proceedings — Order on point allowed to become final operates as *res judicata* even if it has not been decided on merits.

The rule of *res judicata* as laid down in S. 11, Civil P. C., with reference to matters decided by a Court of competent jurisdiction in a previous suit is neither relevant nor applicable in any subsequent proceedings arising out of the same decree. If a matter has once been finally decided between the parties to those proceedings, the effect is the same as that of an interlocutory judgment in an ordinary suit and is binding upon the parties for the rest of the proceedings, if it has been allowed to become final. On this view, if a matter has once been allowed to be finally decided, there is no reason why the matter should be allowed to be reopened whether it has been decided on the merits or not : 6 All. 269 (P.C.), *Foll.* [P 72a,b]

(b) *Execution* — Order of dismissal in — Remedies, explained.

A person against whom an order of dismissal in default had been passed in execution proceedings can certainly apply to the Court to use its inherent powers in order to restore proceedings dismissed in default. If this is dismissed and a fresh application is presented, the effect of the earlier dismissal can then be considered. Probably the safest course would be to ask for both in the alternative. In one case or the other an appeal would have to be accepted, since at some stage the rights of the parties are to be finally determined, unless it could be held that an order of dismissal in default is not only not appealable but final, so that no appeal would lie at any stage : ('21) 8 A. I. R. 1921 Lah. 67, *Rel. on;* ('26) 13 A. I. R. 1926 All. 401, *Ref.* [P 72d,e]

D. N. Aggarwal — for Appellant.

Mahmud Ali — for Respondent.

Judgment.—The house of the judgment-debtor having been attached he preferred an objection to the executing Court that it was not liable to attachment as he was an agriculturist and the house was used for agricultural purposes. This objection was dismissed in default. The judgment-debtor presented two applications for restoration of the proceedings, but both of these were dismissed. He then put in a fresh objection, but a hearing was refused on the ground that the judgment-debtor had become an insolvent. The house was subsequently sold, some two years after the original objection had been put in, and the judgment-debtor then raised the same objection once again in the form of an objection to the confirma-

he High Court. There is no appeal to the Crown or by the accused. There is no provision for a private complaint by a private complainant. The powers of the High Court are, given under S. 439, Criminal Procedure Code, exactly the same as the powers of a Court of appeal conferred by S. 427, 428 or S. 333. Under cl. (4) of S. 439 the High Court cannot convert a conviction into one of acquittal, under the powers conferred under S. 439 the accused to be retried by a competent jurisdiction subordinate to the High Court. In considering the powers of the High Court whether such a retrial should or should not be ordered, the discretion of the High Court is legally unlimited. In actual fact, the High Court seldom exercises this discretion as laid down in a number of cases, namely, that an order of acquittal is a rule that has been interfered with merely by a High Court disagreeing with the finding of the Magistrate. It is only when the finding is incomplete or there is a flaw in the finding or where the finding is manifestly perverse that the High Court interferes in such cases. In the present case the main point is that the evidence has been rejected.

The Court has also been dealt with in many cases and the general trend of authority is that where the evidence has been so rejected it is much the same position as if the Judge, who combines the functions of Judge and jury, had misdirected himself to what the evidence was in the case. It will be open for the High Court ever, to consider whether in spite of the misdirection, any finding other than acquittal would have been come to in the circumstances of the particular case and the Court would not order a retrial unless it was clearly to the conclusion that the misdirection the Court might have come to a different finding. It actually did. In this connection it might be seen. I would answer accordingly.

All J. — I agree.

— I agree.

Reference answered.

Mad. 1 : 2 Weir 521, Emperor v. William Smith.

S. 439 N. 13 Pt. 1 ; S. 439 N. 25 S. 439 N. 25a Pts. 1, 3 and 8. a, Pages 1426 & 1427 N. 1204 "Inter- with acquittal." Page 1429 Note 1205. 434 N. 1208 "Power to order retrial." 1453, 1456 and 1457 N. 1219.

tion of the sale. This was rejected on the ground that the matter had already been decided. An appeal by the judgment-debtor has been admitted to a hearing on the argument that the matter has not yet been decided on the merits so that the rule of res judicata does not apply. This may be true enough; but as laid down by the Privy Council in 11 I. A. 37,¹ the rule of res judicata as laid down in S. 11, Civil P. C., with reference to matters decided by a Court of competent jurisdiction in a previous suit is neither relevant nor applicable in any subsequent proceedings arising out of the same decree. If a matter has once been finally decided between the parties to those proceedings, the effect is the same as that of an interlocutory judgment in an ordinary suit and is binding upon the parties for the rest of the proceedings, if it has been allowed to become final. On this view, if a matter has once been allowed to be finally decided, there is no reason why the matter should be allowed to be reopened whether it has been decided on the merits or not.

Mr. Dwarka Nath Aggarwal, however, contends that the matter should not be treated as finally decided. He bases his argument on the judgment of Sulaiman J. in A. I. R. 1926 ALL. 401,² in which attention was drawn to the fact that a decree as defined in S. 2 of the Code does not include an order of dismissal in default, so that no appeal can lie against such an order in the absence of any special provision allowing such an appeal. He further contends that no appeal could lie against any order refusing to restore the objection. This seems to me to be arguable, but I do not think it is necessary to decide the point for the purposes of the present case. A.I.R. 1926 ALL. 401² expressly left open the question of the appropriate remedy for a person against whom an order of dismissal in default had been passed in execution proceedings. He can certainly apply to the Court to use its inherent powers in order to restore proceedings dismissed in default as held in 2 Lah. 66.³ If this is dismissed and a fresh application is presented, the effect of the earlier dismissal can then be considered. Probably the safest course would be to ask for both in the alternative. In one case or the other it seems to me that an

appeal would have to be accepted, since at some stage the rights of the parties are to be finally determined, unless it could be held that an order of dismissal in default is not only not appealable but final, so that no appeal would lie at any stage. In the present case the judgment-debtor had already sought to obtain both remedies in turn and he might have appealed against the order holding that he was not competent to present the objection when it was put forward for the second time. By now, I think that the matter must be regarded as having been finally concluded between the parties, and the objection cannot be raised yet again as an objection to the confirmation of the sale. The appeal is accordingly dismissed with costs.

K.S./R.K.

Appeal dismissed.

C. P. C.—

(a) ('40) Chitaley, S. 11, N. 23, Pts. 3 and 4.

('41) Mulla, Page 88 Pt. (g); Page 89 Pt. (v).

(b) ('40) Chitaley, S. 151, N. 2, Pt. 26.

('41) Mulla, Page 480, Pt. (x).¹

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BECKETT J.

Uttam Singh — Petitioner

v.

Municipal Committee, Rawalpindi —

Respondent.

Criminal Revn. Petn. No. 1230 of 1941, Decided on 23rd September 1941; case reported by District Magistrate, Rawalpindi, D/- 2nd July 1941.

Punjab Municipal Act (3 of 1911), S. 81—Application to Magistrate under S. 81—Magistrate can decide whether amount claimed is claimable under Act — Application transferred to Tahsildar—Whether Tahsildar can decide objection that amount is not recoverable under Act.

A Magistrate dealing with an application under S. 81 has himself power to decide whether the amount claimed is in fact claimable under the Act, on objection being raised before him. There is no need of a reference to the High Court. If a transfer order under S. 81 is intended to be an order transferring the application under S. 81 to the Tahsildar for disposal as a Magistrate, then it can be left to the Tahsildar to decide the objection that the amount claimed is not claimable under the Act in that capacity. If it is an order of transfer, however, the District Magistrate should dispose of the objection himself. It is advisable that the form of such orders should make the intention clear. [P 73g; P 74b].

Jhanda Singh — for Petitioner.

Amolak Ram — for Respondent.

REPORT.—The applicant, Sardar Uttam Singh Duggal obtained from the Municipal Committee, Rawalpindi, a contract or agreement allowing him the lease of a certain

1. ('34) 6 All. 269 : 11 I. A. 37 (P.C.), Ram Kirpal Shukla v. Mt. Rup Kuari.

2. ('26) 13 A.I.R. 1926 All. 401 : 94 I. C. 1, Hira Lal v. Tikam Singh.

3. ('21) 8 A.I.R. 1921 Lah. 67 : 60 I.C. 720 : 2 Lah. 66 : 64 P.L.R. 1921, Bholu v. Ram Lal.

a portion of land said to belong to the committee for use as a motor stand at a certain monthly rental. He occupied the plot in question for the year 1935-36 and paid the full amount of rent. For the year 1936-37 the committee sanctioned the continuance of the lease in his name at a slightly increased monthly rent; on the basis of the rent fixed the total rent due from him was said to be Rs. 4080, out of which he paid Rs. 2820 in instalments, and the remainder, i. e., Rs. 1260 is outstanding against him. When the committee failed to recover this amount from him they made an application to the District Magistrate under S. 81, Municipal Act, for recovery of the amount under the provisions of that section. This application was sent to Khan Mohammad Afzal Khan, Tahsildar (Magistrate, Second Class), Rawalpindi, for recovery in due course, and he took certain steps towards the recovery. The applicant has now applied for revision of the Magistrate's order on the main ground that the amount in question was not recoverable under S. 81, Punjab Municipal Act, and that, therefore, procedure under that section was illegal.

The application before me purports to be in the alternative an application for revision of an order passed by the said Magistrate, ordering the recovery of a certain sum on behalf of the Municipal Committee of Rawalpindi under S. 81, Punjab Municipal Act, and an appeal against the original order of the Municipal Committee demanding that sum. It is clear at the outset that such an application is radically deficient in form. An application for revision must be made to the District Magistrate for the exercise of his powers under S. 438, Criminal P. C., in regard to a Magistrate under his control. On the other hand an appeal against the order of a Municipal Committee, setting up a demand or levying a tax, lies only to the Deputy Commissioner under the provisions of the Municipal Act. The two processes, therefore, must be taken in two different Courts and under two different Acts. The fact that both offices are in fact held by one individual in no way justifies a joint or alternative application under both procedures. I am, therefore, dealing with this application only as District Magistrate exercising powers under S. 438, Criminal P. C.

The proceedings are forwarded for revision on the following grounds: Counsel for the applicant has produced before me a number of rulings of the Lahore High Court,

A. I. R. 1927 Lah. 161,¹ A. I. R. 1934 Lah. 699² and A. I. R. 1938 Lah. 29³ and also one ruling of the Judicial Commissioner, North West Frontier Province, A.I.R. 1939 Pesh. 40,⁴ to the effect that an order passed by a Magistrate in a case to which S. 81 does not apply, can be set aside on revision, and also to the effect that rent due to a Municipal Committee can only be recovered under S. 81 if that rent can be shown to be claimable under the Municipal Act. In the present case I questioned the Secretary of the Municipal Committee, who appeared in person, as to the section of the Act under which he claims that this rent is chargeable by the committee. He has quoted S. 173 (1) (a),^f but it is quite clear to me that that section is entirely inapplicable to the present case, in which a plot of vacant land has been leased to the applicant for the purpose of a lorry stand; there is no question of the grant of permission, on payment of certain fees, for the erection of any moveable encroachment, etc., such as is contemplated under the clause quoted. I can find no other provision of the Act under which the rent for this plot is claimable, and I must, therefore, hold that it is claimable on the basis of an ordinary contract, and is, therefore, not recoverable under S. 81 of the Act. I, therefore, report the case to the Hon'ble High Court with the recommendation that the order of the Magistrate for recovery of the amount under S. 81, Municipal Act, be set aside.

Order of the High Court

I think it may be taken as settled law in the Punjab that a Magistrate dealing with an application under S. 81, Punjab Municipal Act, has himself power to decide whether the amount claimed is in fact an amount claimable under the Act, on objection being raised before him. If the original order had been passed without notice, as was apparently done in the present case, the Magistrate could decide the question himself and there was no need for a reference to this Court. There is, however, one slight difficulty. The learned District Magistrate has apparently

1. ('27) 14 A. I. R. 1927 Lah. 161 : 99 I. C. 1030 : 28 Cr. L. J. 230, *Maya Das v. Municipal Committee, Chiniot*.

2. ('34) 21 A. I. R. 1934 Lah. 699 : 142 I. C. 919 : 15 Lah. 884 : 36 P.L.R. 298, *Municipal Committee, Delhi v. Hafiz Abdullah*.

3. ('38) 25 A. I. R. 1938 Lah. 29 : 173 I. C. 211 : 39 Cr. L. J. 286, *Guranditta Mal v. Emperor*.

4. ('39) 26 A. I. R. 1939 Pesh. 40 : 134 I. C. 16 : 40 Cr. L. J. 851, *Dil Jan v. Municipal Committee, Peshawar*.

a treated the order of the tahsildar for the issue of a warrant of distress as a judicial order, with which he himself was not competent to interfere. It has, however, been suggested that the tahsildar was merely acting in his ministerial capacity under the orders of the District Magistrate, who should still be regarded as the Magistrate in a judicial charge of the case. This view derives some support from the form of the order, which simply contains an order for recovery, and it appears to have been treated as such by the tahsildar, who reported his difficulties to the District Magistrate. Before further action is taken, I think that the District Magistrate should first decide what is the meaning of the order. If it is intended to be an order transferring the application to the tahsildar for disposal as a Magistrate, then it can be left to the tahsildar to decide the objection in that capacity. If it is an order of transfer, however, the District Magistrate will dispose of the objection himself. It seems advisable that the form of such orders should make the intention clear in future.

Counsel for the Committee states that this case is intended as a test case. If that is so, I think that a few further observations are necessary. The claim is one for a sum said to be due by way of rent; but this is a term which is loosely used in cases of this kind to cover either a claim arising out of a lease or license conferring some right in immovable property, or out of the right to collect fees or taxes on behalf of the Committee for a fixed period. It would be difficult to arrive at a decision on the point like this without knowing whether the site in question forms part of a public street or not and what exactly is the nature of the rights which were granted by the Committee; and these are points which may require evidence before they can be settled. It is probably d advisable not to lay down too elaborate a procedure for an enquiry which may be necessary under s. 81. But it seems unlikely that a decision of any value in a test case will be reached if the matter is treated merely one for arguments, as appears to have been done so far; and I think that it would probably be advisable to give both sides an adequate opportunity to prepare their respective cases and arrange for the production of evidence, if necessary.

G.N./R.K.

Order accordingly.

* A. I. R. (29) 1942 Lahore 74

TEK CHAND AND MONROE JJ.

K. Raghbir Singh and others —

Appellants

v.
Indian Mutual Provident Fund Insurance Co. Ltd. — Respondent.

Letters Patent Appeal No. 134 of 1939, Decided on 4th July 1941, against order of Din Mohammad J., in C. O. No. 246 of 1938, D/- 21-6-1939.

(a) Life Assurance Companies Act (1912), S. 2 (3) — 'Court' means District Court in Punjab.

So far as the Punjab is concerned 'Court' in the Life Assurance Companies Act means the District Court only. [P 75d]

(b) Companies Act (1913), Ss. 2 (3), 3—Court means High Court in Punjab. f

Under the Companies Act the High Court is the Court which has jurisdiction to wind up a company registered under it and having its registered office anywhere in the Punjab. [P 75g, h]

(c) Life Assurance Companies Act (1912), S. 22 — Application for winding up should be made to District Court.

The provisions of Life Assurance Companies Act, as contained in S. 22 are kept intact, and not affected by the provisions of the Companies Act. Therefore the Court to which an application for winding up an insurance company is to be made is the principal civil Court of original jurisdiction in the district where the head office of the company is situate, i. e., the District Court and must be made by persons and subject to the qualifications mentioned in S. 22: ('34) 21 A.I.R. 1934 Cal. 63 and ('38) 25 A.I.R. 1938 Bom. 132, Expl., and Disting. [P 75h; P 76a, e]

Tek Chand — for Appellants.

J. N. Aggarwal and S. M. Sikri —

for Respondent.

Tek Chand J. — This is an appeal under cl. 10, Letters Patent, from the judgment of Din Mohammad J., holding that this Court has no jurisdiction to entertain an application for the winding up of the Indian Mutual Provident Fund Insurance Co. Ltd., Lahore, and directing that the application be sent to the District Judge, Lahore, for disposal in accordance with law. The company was first registered under the Provident Insurance Societies Act, 5 of 1912, on 15th February 1928, its name at that time being the "Indian Provident Mutual Fund, Lahore" and the head office at Lahore. In 1933 the company widened the scope of its business, changed its name into the "Indian Mutual Provident Fund Insurance Co. Ltd., Lahore," and had itself registered under the Life Assurance Companies Act, 6 of 1912. Again, on 19th February 1936, it was registered under the Companies Act, 7 of 1913, as a company limited by guarantee, retaining its former name. h

On 4th November 1938, 21 persons presented in the High Court a petition under S. 162,

Companies Act, for the winding up of the company. After certain proceedings, the matter came up before Din Mohammad J., when a preliminary objection was taken that this Court had no jurisdiction to entertain the application. It was contended that the only Court to which the application could be made was the District Court, Lahore, in view of the provisions of s. 22, Life Assurance Companies Act, 6 of 1912, read with s. 287, Companies Act. This objection was upheld by the learned Judge, who directed that the application be sent to the District Judge, Lahore, for disposal. From this judgment the petitioners have preferred an appeal under the Letters Patent. As has been stated above, the company is registered both under the Life Assurance Companies Act, 6 of 1912, as well as the Companies Act, 7 of 1913. The provisions of the two Acts relating to the forum in which an application for winding up of a company registered under it is to be made are different, and the question for determination is which of them governs the case of a company, which is registered under both Acts.

In s. 2 (3) of Act 6 of 1912, it is laid down that in that Act 'Court' means the principal civil Court of original jurisdiction in a district and includes the High Court in the exercise of its ordinary original civil jurisdiction. Under s. 24, Punjab Courts Act, the District Court is the principal Court of original jurisdiction in a district. Unlike the Presidency High Courts (Calcutta, Bombay and Madras), the High Courts of Allahabad, Lahore, Patna and Nagpur have no ordinary original civil jurisdiction; the Lahore High Court only exercises extraordinary original civil jurisdiction under cl. 9, Lahore Letters Patent, and this is limited to cases which under the law can be instituted in any of the subordinate Courts but are, by order of the High Court, transferred to it for trial. These High Courts also have "special original jurisdiction" in respect of matter in which it is specifically authorized to exercise original jurisdiction by a special statute, e. g., the Divorce Act. The position under Act 6 of 1912, therefore, is that so far as the Punjab is concerned "Court" means the District Court only. Section 22 of this Act prescribes the forum for winding up of companies registered under the Act. It lays down :

The Court may order the winding up of a Life Assurance Company in accordance with the Companies Act 6 of 1882 and the provisions of that Act shall apply accordingly subject, however, to the modification that the company may be ordered to be wound up —

(a) on the petition of ten or more policy-holders : Provided that such a petition shall not be presented except by the leave of the Court, and leave shall not be granted until a prima facie case has been established to the satisfaction of the Court, and until security for costs for such amount as the Court may think reasonable, has been given; or
(b) on application made on behalf of the Governor-General in Council, showing that from a consideration of the documents deposited with him under the provisions of this Act it appears to him that the company is insolvent.

From these provisions, it is clear that in the Punjab an application for winding up of the company registered under this Act can be made only to the District Court, and by the person, and subject to the conditions, mentioned in s. 22. After this application has been made, the procedure is regulated by the provisions of the Companies Act. In 1912 when this Act was passed, there was no conflict between it and the Companies Act, 1882 (which was then in force) as regards the Court in which a winding-up application could be made. In that Act also, "Court" was similarly defined as the Court of original civil jurisdiction in a district and also included the High Court in the exercise of its ordinary civil jurisdiction. In 1913, however, the Companies Act of 1882 was replaced by Act 7 of 1913. In s. 2 (3) of this Act, "the Court" was defined as meaning the Court having jurisdiction under the Act. In s. 3 it was laid down that the Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate. To this section is added a proviso authorising the local Government by notification to empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court. No such notification has so far been issued by the Punjab Government. It is evident, therefore, that under the Companies Act the High Court is the Court which has jurisdiction to wind up a company registered under it and having its registered office anywhere in the Punjab. If therefore there had been no other provision in the Act, the position with regard to a company registered under Act 5 of 1912 and the Companies Act would be highly anomalous. Under the former Act, the application would lie in the District Court, while under the latter in the High Court. Section 287, Companies Act, however, has solved this difficulty. It lays down that nothing in this Act shall affect the provisions of the Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912.

The combined effect of these provisions, therefore, is that the provisions of Act 6 of

1912, as contained in S. 22, are kept intact, and not affected by the provisions of the Companies Act. An application for the winding up of such a company must be presented in the District Court only and must be made by persons, and subject to the qualifications, mentioned in S. 22 of that Act. Counsel for the appellants referred to 37 C.W.N. 1159=A.I.R. 1934 Cal. 63¹ where Costello J. had remarked that where a life insurance company is registered under the Companies Act, 1913, it is prima facie subject to all the provisions of that Act. From this it is sought to be argued that it is the forum laid down in the Companies Act, in which an application for winding up of an insurance company must be made. This, however, by no means follows from the decision in the case cited. That was not a case in winding-up, but was an appeal from an order of a Magistrate who had convicted the insurance company under certain sections of the Companies Act for having failed to get its accounts balanced and a balance-sheet prepared and to make a list of its members. There is no provision relating to these matters in the Assurance Act, 1912. As the company had been registered under the Companies Act, it was held that the necessary consequence of such registration was that the company took upon itself all the obligations imposed by that Act and there was no escape from those obligations merely because the company was doing insurance business and had also been registered under the Life Assurance Companies Act.

Reference was also made to a Single Bench decision of the Bombay High Court in A. I. R. 1938 Bom. 182,² which laid down that the effect of S. 287, Companies Act, 1913, and S. 22, Life Assurance Companies Act, 1912, is to incorporate into the Life Assurance Companies Act the relevant provisions about the winding up contained in the Companies Act, including the provisions of s. 166. This, again, does not touch the question of the forum, in which the application for winding up is to be made: it merely lays down the form in which the application is to be made, the particulars it must contain, and the procedure, which is to be followed, on such application. As has been pointed out above, so far as the forum is concerned S. 287, Companies Act, read with ss. 22 and 2 (3), Life Assurance Companies Act, 1912, makes it per-
 1. (34) 21 A.I.R. 1934 Cal. 63 : 147 I.C. 848 : 35 Cr. L. J. 492 : 37 C.W.N. 1159, Ajit Kumar Chatterjee v. Emperor.
 2. (88) 25 A. I. R. 1938 Bom. 182 : 174 I.C. 593 : 40 Bom. L. R. 52, In re Aryan Life Assurance Society Ltd.

fectly clear that the Court to which an application for winding up an insurance company is to be made is the principal civil Court of original jurisdiction in the district where the head office of the company is situate. This, in the present case, is the District Court, Lahore. For all these reasons, I hold that the decision of the learned Judge in Single Bench was correct. I would accordingly dismiss the appeal, but, having regard to the difficult nature of the question involved and the fact that there was no previous decision of this or any other Court bearing on the point, would leave the parties to bear their own costs throughout.

Monroe J.—I agree.

K.S./R.K. *Appeal dismissed.*

* A. I. R. (29) 1942 Lahore 76

BHIDE J.

Chanana Singh and others — Accused—
Petitioners

v.

Tarak Singh — Complainant —

Respondent.

Criminal Revn. Petn. No. 1585 of 1941, Decided on 25th November 1941, for revision of order of Sess. Judge, Ludhiana, D/- 13th August 1941.

* (a) Criminal P. C. (1898), S. 195 — Scope—
 Complaint to public servant—Allegations constituting offence under S. 500, I. P. C. — Complaint under S. 500, I. P. C., can be taken cognizance of even if allegations constitute offence mentioned in S. 195, Criminal P. C., and S. 195 is no bar.

The allegations in a complaint made to a public servant or Court may have a double aspect. On the one hand, the objections, if false, may constitute an offence against the authority of the public servant or public justice. On the other hand, they may also constitute the offence of defamation. Even if the public servant or the Court concerned does not consider it fit to take action in respect of any offence of the first kind falling within the purview of S. 195, Criminal P. C., it is difficult to see, why a private individual whose reputation is harmed should be deprived of his remedy simply because the allegations are made in a complaint to a public servant or a Court. Therefore, the mere fact that the allegations constituting the offence of defamation are contained in a petition to a public servant or a Court, is per se no ground for holding that S. 195, Criminal P. C., is a bar to the cognizance of the offence. The question whether the facts alleged in the complaint really constitute an offence falling within the provisions of S. 195, Criminal P. C., or not must depend upon the circumstances of each case. But if the facts alleged, prima facie constitute the offence under S. 500, Penal Code, there is no reason why that offence should not be taken cognizance of on a complaint by the aggrieved person : *Case law referred.* [P 78d, f, g]

(b) Penal Code (1860), S. 499, Exception 8 —
 Onus is on person setting up this plea.

If a complaint containing allegations amounting to an offence of defamation has been made in good faith, the person making the complaint will of

course be protected by the Exception 8 to S. 499 but it is for the complainant to establish his good faith. [P 78e]

Jiwan Lal Kapur — for Petitioners.

Jhanda Singh — for Respondent.

Order.—The material facts giving rise to this petition for revision are as follows : The ten petitioners presented an application to the District Magistrate, Ludhiana, making certain allegations against Tarak Singh lambardar. The learned District Magistrate did not deal with the petition as a regular complaint under the Criminal Procedure Code but treating it as a miscellaneous petition had an enquiry made through the police and finding the petition to be groundless ordered it to be filed. Thereafter, a complaint was filed by Tarak Singh against the petitioners under s. 500, Penal Code. The petitioners raised an objection that this offence could not be taken cognizance of in the absence of a complaint by the District Magistrate as required by s. 195, Criminal P. C. This contention was upheld by the trial Magistrate but on appeal the learned Sessions Judge has held that no complaint by the District Magistrate under s. 195, Criminal P. C., was necessary in the circumstances of the case. He therefore directed further enquiry into the complaint. The petitioners have now come up in revision to this Court.

The learned counsel for the petitioners has urged that the allegations made by the petitioners in the application to the District Magistrate constitute an offence under s. 211 or s. 182, Penal Code, and therefore according to s. 195, Criminal P. C., no Court could take cognizance of the matter except on a complaint made by the District Magistrate. It is contended that the provisions of s. 195, Criminal P. C., could not be evaded by the lodging of a complaint under s. 500, Penal Code, on facts which really constitute an offence falling within the purview of s. 195, Criminal P. C. In support of this contention reliance was placed on 44 Cal. 970,¹ A. I. R. 1935 Rang. 163,² 59 Mad. 165,³ 55 Mad. 349⁴ and A.I.R. 1939 Mad. 365.⁵ The learned coun-

sel for the respondent on the other hand relied on 1932 Mad. W. N. 1263,⁶ A. I. R. 1925 Lah. 631,⁷ A. I. R. 1937 Lah. 802,⁸ 48 Cal. 388⁹ and 37 Cal. 604.¹⁰ The rulings cited by the learned counsel for the petitioners are to the effect that when the allegations made in a complaint constitute an offence falling within the purview of s. 195, Criminal P. C., the provisions of that section should not be allowed to be evaded by treating the allegations as though they constituted a lesser or different offence not mentioned in the section.

The main point for consideration, therefore, is whether the allegations set forth in the complaint in the present case properly constitute an offence falling within the purview of s. 195, Criminal P. C. The petition to the District Magistrate was of a general character. It was alleged that the police were corrupt in oppressing the public and that Tarak Singh lambardar was in league with the police, was taking bribes and helping the police to secure bribes for letting off guilty persons. The case of one Dalip Singh who was let off in this manner was also mentioned in the application, but this was apparently done only by way of illustration. Tarak Singh lambardar alleged in his complaint under s. 500, Penal Code, that the allegations made against him were false and that they had been made in order to defame him. The learned counsel for the petitioners contended (with some justification, I think) that, properly construed, the allegations made by the petitioners in the application to the District Magistrate constitute an offence under s. 211 or s. 182, Penal Code, and therefore the complaint could not be treated as one under s. 500, Penal Code, only. It was, therefore, necessary (he urged) that a complaint should have been made by the District Magistrate himself as required by the provisions of s. 195, Criminal P. C. The learned counsel for the respondent on the other hand contended that there is nothing to prevent a complainant from seeking redress

1. ('17) 4 A. I. R. 1917 Cal. 708 : 38 I. C. 761 : 44 Cal. 970 : 25 C. L. J. 445 : 21 C. W. N. 253 : 18 Cr. L. J. 377, *Profulla Kumar v. Hirendra Nath*.
2. ('35) 22 A.I.R. 1935 Rang. 163 : 156 I. C. 598 : 36 Cr. L. J. 970, *Swee Ing v. Koon Han*.
3. ('36) 23 A.I.R. 1936 Mad. 89 : 159 I. C. 853 : 37 Cr. L. J. 159 : 59 Mad. 165 : 69 M. L. J. 812, *In re Appadurai Nainar*.
4. ('32) 19 A.I.R. 1932 Mad. 253 : 136 I. C. 779 : 33 Cr. L. J. 861 : 55 Mad. 343 : 62 M. L. J. 735, *In re Ravanappa Reddi*.
5. ('39) 26 A.I.R. 1939 Mad. 368 : 181 I. C. 86 : 40 Cr. L. J. 542 : (1939) 1 M. L. J. 412, *T. S. Shanmugasundaram Pillai v. A. Manicka Mudaliar*.

6. ('33) 1933 M. W. N. 1263, *Venkataramanjulu Chetty v. Kaniiah Chetty*.

7. ('25) 12 A.I.R. 1925 Lah. 631 : 95 I. C. 305 : 27 Cr. L. J. 769 : 6 Lah 375 : 26 P. L. R. 552, *Mt. Nawrati v. Emperor*.

8. ('37) 24 A.I.R. 1937 Lah 802 : 172 I. C. 373 : 39 Cr. L. J. 122 : 39 P. L. R. 1011, *Ghulam Mahom-mad v. Emperor*.

9. ('21) 8 A.I.R. 1921 Cal. 1 : 59 I. C. 148 : 22 Cr. L. J. 31 : 48 Cal. 388 : 32 C.L.J. 94 : 24 C. W. N. 982 (SB), *Satish Chandra v. Ram Dayal De*.

10. ('10) 37 Cal. 604 : 6 I. C. 352 : 12 C. L. J. 15 : 14 C. W. N. 839, *Ramsebak Lal v. Muneswar Singh*.

a with respect to the offence under S. 500, Penal Code, on the facts alleged in the petition, if he chose to do so. It was also pointed out that Tarak Singh being the 'aggrieved' person the offence of 'defamation' could not be taken cognizance of except on a complaint made by Tarak Singh himself, according to the provisions of s. 195, Criminal P. C. There seems to be force in these contentions. Section 499, Penal Code, contains an exception in respect of complaints made in good faith to public servants: *see* Exception 8. This exception suggests that notwithstanding the provisions of s. 195, Criminal P. C., a complaint for defamation would be maintainable b in respect of allegations made to a public servant and the burden of proof would lie on the accused person to show that his case falls within the aforesaid exception: *see* s. 105, Evidence Act.

Out of the rulings cited by the learned counsel on behalf of the respondent, the first one, viz., 1933 M. W. N. 1263,⁵ appears to support his contention, but it is a Single Bench ruling and seems to be opposed to the view taken in the Division Bench rulings cited on behalf of the petitioners, viz., 59 Mad. 166³ and 55 Mad. 343.⁴ The other rulings do not seem to be in point. In A.I.R. 1925 Lah. 631,⁷ c the question of necessity of a complaint under s. 195, Criminal P. C., in the circumstances of the case was not considered. In A.I.R. 1937 Lah. 802,⁸ the offences of which the accused were convicted, were quite distinct from those mentioned in s. 195, Criminal P. C. In 37 Cal. 604¹⁰ at p. 606, it was found that the person to whom complaint had been made was not a public servant. In 48 Cal. 388,⁹ the point for decision was different,—though there are some observations at pp. 424-5 which are in favour of the respondent. The point of law involved in this case is important and not free from difficulty. The allegations in a complaint made to a public servant a or Court may have a double aspect. On the one hand, the objections, if false, may constitute an offence against the authority of the public servant or public justice. On the other hand, they may also constitute the offence of defamation. Even if the public servant or the Court concerned does not consider it fit to take action in respect of any offence of the first kind falling within the purview of s. 195, Criminal P. C., it is difficult to see, why a private individual whose reputation is harmed should be deprived of his remedy simply because the allegations are made in a complaint to a public servant or a Court. It is significant

that s. 500, Penal Code, is not an offence specified in s. 195, Criminal P. C. If the complaint has been made in good faith, the person making the complaint of course be protected by Exception 8, s. 499, Penal Code,—but it is for the complainant to establish his good faith and the ingredients of the offences falling under Criminal P. C., (such as offences under s. 211, Penal Code, etc.,) are different from those of the offence under s. 500, Penal Code. In a particular case the complainant may be able to establish the requisite intention and knowledge for the latter offence, though he may not be able to establish the same for the former. It is for the Court to know the knowledge or intention for an offence under s. 195, Criminal P. C., such as s. 211, Penal Code.

After carefully considering the matter, I am of opinion that the mere fact that allegations constituting the offence of defamation are contained in a petition to a public servant or a Court, is per se no ground for holding that s. 195, Criminal P. C., applies to the cognizance of the offence. The question whether the facts alleged in the petition really constitute an offence within the provisions of s. 195, Criminal P. C., or not must depend upon the circumstances of each case. But if the facts alleged *facie* constitute the offence under s. 500, Penal Code, I do not see why the Court should not be taken cognizance of the offence by the aggrieved person. In the present instance, the complainant, viz., District Darbari, an assessor and a public servant, has alleged that the petitioner has maliciously complained to the District Magistrate against him to harm his reputation. On the allegations, I do not see why the Court under s. 500, Penal Code, should not take cognizance of the offence and investigate. I see no good reason to set aside the order of the Sessions Judge, and dismiss this petition. *K.S./R.K. Petition dismissed.*

Cr. P. C.—

(a) (41) Chitaley, S. 195, N. 3.

(41) Mitra, Page 633, N. 614d.

Penal Code —

(b) (36) Ratanlal, Pp. 1250, 1251; N. "G."

A. I. R. (29) 1942 Lahore
BECKETT J.

Sajjan Singh and another
Accused — Petitioners

v.

Emperor.

Criminal Revn. Petn. No. 1270 of 1941
on 16th September 1941, for revision of
District Magistrate, Lahore, D/- 29th M

(a) Criminal P. C. (1898), S. 514 (7)—Previous judgment admissible by itself — Objection that certified copy was filed is merely technical without much substance.

Where the previous judgment showing the conviction of a person and involving a forfeiture of the bond executed by him is admissible in evidence by itself, an objection under S. 514 (7) that no certified copy of the same was filed would only be a technical objection without much substance. [P 79c]

(b) Criminal P. C. (1898), S. 514 (7)—Copy of earlier judgment is not sufficient to prove forfeiture of security except in cases mentioned S. 514 (7).

A copy of the earlier judgment would not be sufficient evidence alone in proof of forfeiture of a security bond against a surety except in the instances specifically mentioned in S. 514 (7), which permits production of a certified copy in certain security proceedings, but these do not include proceedings in which a security was given during an enquiry under S. 117 and therefore in such a case the surety is entitled to have evidence in proof of forfeiture of security bond taken again. [P 79d, e]

(c) Criminal P. C. (1898), S. 514 — Security bond — Conviction of principal leading to forfeiture — Sentence reduced partly on ground of provocation by complainant—That is extenuating circumstance which can be considered in determining surety's liability to keep principal under control.

Where the principal is convicted of an offence involving a forfeiture of the security bond executed by him, the fact that his sentence was reduced partly on the ground that there had been some provocation by the complainant is certainly an extenuating circumstance which should be taken into mind in determining the responsibility of the surety for keeping his principal under control. [P 79f]

Bal Raj — for Petitioners.

Order. — There are certain irregularities in this case. In the first place, there was not apparently any formal tender of evidence to the prosecution to show that the bond had become forfeited. Sub-section (7) of Sec. 4, Criminal P. C., provides that in certain cases a certified copy of a judgment may be given in evidence against the surety; but no such copy has been filed on the record. If the previous judgment were admissible in evidence by itself, this would only be a technical objection without much substance; as noted by the learned District Magistrate, the conviction appears to have been taken as correct by both sides and the earlier proceedings were brought into Court as connected files. There is, however, a further difficulty. As already mentioned, S. 514 (7) permits production of a certified copy in certain security proceedings, but these do not include proceedings in which a security was given during an enquiry under S. 117, Criminal P. C., as in the present case. This may be the result of an oversight when the Code was amended in 1923; but it is also possible that the omission may have been

intentional. In any case, S. 514 was amended in consequence of the Calcutta view that a surety is entitled to have the evidence taken again, since he was not a party to the proceedings leading to conviction; and as the Code now stands, it must be taken as implying that a copy of the earlier judgment would not be sufficient evidence alone in proof of forfeiture against a surety except in the instances specifically mentioned.

The obvious course would be to quash the present order of forfeiture and send the proceedings back for a fresh hearing. At this point, however, a further difficulty arises, since there is some doubt present whether this course can be taken in appeal or revision from an order of forfeiture of security. The question was referred by me yesterday to a Division Bench and may take some time to decide. On the whole, I am doubtful whether it is worthwhile keeping this case pending any longer. From the judgment of the Sessions Court, it would appear that the sentence was reduced partly on the ground that there had been some provocation by the complainants. This is certainly a circumstance which should be taken into mind in determining the responsibility of the surety for keeping his principal under control, and in view of this extenuating circumstance, this is hardly a sufficiently strong case to justify an order which would put the surety to the expense and inconvenience of a fresh trial, which has only been necessitated by the negligent manner in which the prosecution has been conducted.

For these reasons, I accept the petition for revision and set aside the order of forfeiture without any further direction. I do this with the greatest reluctance, because I entirely agree with the views of the learned District Magistrate as to the desirability of doing anything possible to prevent breaches of the peace in which sharpe-edged weapons are used, and to enforce the responsibility of persons who choose to give security for the behaviour of other persons who are liable to use such weapons.

G.N./R.K.

Petition accepted.

Cr. P. C. —

(a) ('41) Chitaley, S. 514, N. 15.

('41) Mitra, Pages 1665, 1666, N. 1339.

(b) ('41) Chitaley, S. 514, N. 15.

('41) Mitra, Pages 1665, 1666, N. 1339.

(c) ('41) Chitaley, S. 514, Notes 10, 14.

('41) Mitra, Page 1665, N. 1338.

A. I. R. (29) 1942 Lahore 80

BECKETT J.

Babu Ram—Decree-holder—Appellant

v.

*Mohammad Ali and another —**Judgment-debtors — Respondents.*

Exn. Second Appeal No. 1732 of 1940, Decided on 9th June 1941, from order of Dist. Judge, Jullundur, D/- 7th August 1940.

(a) Punjab Relief of Indebtedness Act (7 of 1934), S. 13 (2) — Creditor failing to submit accounts — Debt is automatically discharged — No order of Board is necessary for that purpose.

A Debt Conciliation Board has no power to discharge a debt under S. 13 (2). If a creditor fails to comply with the provisions of the Act regarding the submission of a statement of account within the prescribed time, his debt will be deemed to be automatically discharged and no order of the Board is required for this purpose. [P 80*d,e*]

(b) Punjab Relief of Indebtedness Act (7 of 1934), Ss. 13 and 9 — Sub-mortgagee by way of absolute assignment of debt is, but sub-mortgagee by way of further mortgage is not creditor of mortgagor for purposes of Act.

A sub-mortgagee by way of absolute assignment who takes over the original debt along with the mortgage under a sale of the mortgagee's rights, can be regarded as a creditor of the mortgagor for the purposes of the Act, but a sub-mortgagee by way of further mortgage who holds a mortgage over the original mortgagee's interest in the property and does not take over the debt secured by the first mortgage cannot be regarded as a creditor of the mortgagor for purposes of the Act. [P 80*e,f*; P 81*a,b*]

Vishnu Datta — for Appellant.

Harbans Singh Doabia — for Respondents.

Judgment. — The decree-holder, Babu Ram, holds a final mortgage decree in a suit to which Mohammad Ali was a party. Mohammad Ali was also a party to proceedings before the Local Debt Conciliation Board. Notice was issued to Babu Ram as a creditor of Mohammad Ali and he was called upon to furnish a statement of account. Babu Ram put in a copy of the decree which he held, but the Board held that this was not a proper statement of account and proceeded to pass an order discharging the debt supposed to be due to Babu Ram from Mohammad Ali under S. 13 (2), Punjab Relief of Indebtedness Act, 1934. Babu Ram then applied to the executing Court for continuance of the execution proceedings on the ground that the order of the Debt Conciliation Board was ultra vires and not binding. This application was rejected by the Courts below, which held the order of the Board to be conclusive, and the decree-holder has come up in second appeal. It may be remarked in passing that a Debt Conciliation Board has no power to discharge a debt under S. 13 (2) of the Act in question. If a creditor fails to

comply with the provisions of the Act regarding the submission of a statement of account within the prescribed time, his debt will be deemed to be automatically discharged and no order of the Board is required for this purpose. It is unnecessary to pursue the matter further, however, since the action taken in this case is that Babu Ram was not the creditor of Mohammad Ali of a third person, and if there was no debt due from Mohammad Ali to Babu Ram, the question of a discharge does not arise.

The principal question to be considered is whether a sub-mortgagee by way of absolute assignment can be regarded as a creditor of the original mortgagor for the purposes of the Punjab Relief of Indebtedness Act. In order to explain the position of the parties, it is necessary to refer back to the original mortgage and the subsequent proceedings consequent thereto. Mohammad Ali did not owe any debt to Babu Ram, nor did he mortgage his land to him. There was a debt due from Miran Bakhsh, the father of Mohammad Ali, and Mohammad Ali's land was mortgaged in favour of one Abdul Aziz, who was not a party to the proceedings before the Debt Conciliation Board. Abdul Aziz entered into a transaction with Babu Ram whereby he purported to mortgage his land as a mortgagee of Mohammad Ali. He did not assign those rights, in which the position might possibly have been different now. Babu Ram eventually brought a suit, out of which the present execution proceedings arise, on the basis of the mortgage executed in his favour by Abdul Aziz. As allowed by law to do, he impleaded Mohammad Ali as a defendant and sought for the mortgaged land to be brought in if the debt due to him by Abdul Aziz was not paid. The proceedings were thus in the nature of a composite suit as between Babu Ram and Abdul Aziz on the one hand and between Abdul Aziz and Mohammad Ali on the other. This is reflected in the terms of the preliminary decree, which follows in No. 11 of Appendix D, Civil P. C. The first set out the different sums claimed between the two sets of parties and the second set out to provide for the various consequences that were to follow according as payment was made by either of the defendants or not. If the amount due from the mortgagor was paid into Court, the amount due from the sub-mortgagee was to be paid first and the balance was to be paid to the original mortgagee. If no payment was made, the land was to be sold and the debts paid

a in the same way. No payment being made either by Mohammad Ali or Abdul Aziz, a preliminary decree was passed for the sale of the land.

It may be observed at this point that there are two kinds of sub-mortgagees: a sub-mortgagee by way of absolute assignment and a sub-mortgagee by way of further mortgage. It is possible that a sub-mortgagee, who takes over the original debt along with the mortgage under a sale of the mortgagee's rights, should be regarded as a creditor of the mortgagor for the purposes of the Act, but this is not a matter with which we are here concerned. The position is quite c different when a person only holds a mortgage over the original mortgagee's interest in the property. Such a person does not take over the debt secured by the first mortgage. It is true that he has power to enforce the payment of that debt by bringing the property to sale, but he can only do this by way of security for the payment of his own debt which would generally be of a lesser amount, as in the present instance. If the property is sold, he may receive payment of the amount due to him out of the proceeds, but he does so only as a creditor of the original mortgagee, whose claims against the mortgagor will be wholly or partially satisfied in the process. In these circumstances, it is difficult to see how the mortgagor can be regarded as a debtor of the sub-mortgagee, and the difficulty becomes still more clear when regard is had to the scope of the Act. The function of a Debt Conciliation Board is to effect a reconciliation between a creditor and debtor, regard being presumably had to the nature of the original debt and the way in which interest has accumulated. For this purpose, any creditor submitting a statement of the debts owed to him is required to furnish at the same time full particulars of any such debts. It is quite obvious that in the present case Mohammad Ali would not be in a position to accept any composition of the debt due from Mohammad Ali to Abdul Aziz, who was not a party to the proceedings before the Board, nor would it be within the scope of those proceedings to deal with any debt due from Abdul Aziz to Babu Ram. The position may also be put in another way. Since Abdul Aziz was not a party to the proceedings before the Board, his right to bring the property to sale could not be affected by anything which occurred in the course of those proceedings. This being so, there seems to be no reason why Babu Ram should not continue to make use

of this right as security for the debt due to him from Abdul Aziz. Even if Abdul Aziz had himself appeared before the Board, it would not have been open to him to arrive at any settlement which would have the effect of impairing the security, inasmuch as the mortgagor had notice of the further mortgage, so that the proceedings would have been quite infructuous.

In these circumstances, I think, it must be held that the order of the Board is quite meaningless, inasmuch as there was no debt due from Mohammad Ali to Babu Ram; and if the order is taken as implying that the debt due from Abdul Aziz to Babu Ram is discharged, this would be quite outside the functions of the Board. In these circumstances, Babu Ram is still competent to bring the mortgaged property to sale under his decree. The result is that the appeal is accepted, with costs in favour of Babu Ram against Mohammad Ali throughout and the proceedings are remanded to the executing Court for further proceedings in execution.

G.N./R.K.

Appeal accepted.

*** A. I. R. (29) 1942 Lahore 81**

TEK CHAND AND BLACKER JJ.

Firm Kahn Singh-Soma Singh through Soma Singh—Defendant—Petitioner v.

Baldev Singh—Plaintiff—Respondent.

Civil Revn. Petn. No. 69 of 1941, Decided on 1st December 1941, for revision of order of Sub-Judge, First Class, Lyallpur, D/- 15th November 1940.

(a) Civil P. C. (1908), O. 23, R. 1 and S. 115—Application under O. 23, R. 1 allowed—Mere addition of words "suit dismissed" does not make order appealable—Revision is competent.

Where an application by the plaintiff has been made under O. 23, R. 1 and the only relief asked for is permission to withdraw the suit with liberty to bring a fresh suit and the Court grants the application, the words "the suit is consequently dismissed" at the end of the order added by the Court are a mere surplusage and have no real meaning. The order is in fact and substance one allowing the suit to be withdrawn under O. 23, R. 1 and its real character cannot be changed by these words. Therefore no appeal lies from such order and a revision is competent: ('39) 26 A. I. R. 1939 Lah. 472 and ('35) 22 A.I.R. 1935 Oudh 486, *Rel. on.* [P 82g,h; P 83a]

(b) Accounts — Preliminary decree passed — No appeal therefrom — Court cannot allow suit to be withdrawn.

Where a preliminary decree for rendition of accounts has been passed in a suit for accounts and no appeal has been filed from it, the Court has no jurisdiction, in subsequent proceedings, to re-open any of the matters settled by that decree. Therefore it has no jurisdiction to allow the suit to be withdrawn at this stage with permission to bring a fresh suit: ('24) 11 A.I.R. 1924 P. C. 198, *Rel. on.* [P 85a]

* (c) Principal and agent — Suit for accounts by principal—Preliminary decree—If on taking account, amount is found due to agent from principal, Court should pass final decree to that effect and not dismiss suit: ('27) 14 A. I. R. 1927 Lah. 701=104 I. C. 339; ('32) 19 A. I. R. 1932 Lah. 619=140 I. C. 15 and 16 Lah. 7 = ('34) 21 A. I. R. 1934 Lah. 708=152 I. C. 133, **OVERRULED**.

Normally, it is the agent, and not the principal, who is the accounting party and, therefore, the suit for rendition of accounts can be brought by the principal against the agent and not vice versa. But when the principal has done so and the account has been taken, he cannot escape the consequences. Therefore, if on taking accounts after the preliminary decree it is found that it is the principal who owes money to the agent, a final decree must be passed to that effect. The suit should not be dismissed leaving it to the agent to file another suit for recovery of the same amount against the principal: ('38) 25 A. I. R. 1938 Lah. 723, *Approved*; ('27) 14 A. I. R. 1927 Lah. 701 = 104 I. C. 339; ('32) 19 A. I. R. 1932 Lah. 619 = 140 I. C. 15 and 16 Lah. 7 = ('34) 21 A. I. R. 1934 Lah. 708=152 I. C. 133, **OVERRULED**; *Case law referred*. [P 83c,d]

S. L. Puri — for Petitioner.

Iqbal Singh — for Respondent.

ORDER OF REFERENCE

BECKETT J. — This case raises the question whether it is permissible for a Court to grant a final decree in favour of the defendant when there has been a preliminary decree in favour of the plaintiff, the suit being one for accounts brought by the principal against his agent. The view taken by Jai Lal J. in A. I. R. 1927 Lah. 701¹ and A. I. R. 1932 Lah. 619² is that this could not be done, since an agent cannot sue his principal for accounts, as held in 60 P. R. 1899.³ A contrary view was taken by Dalip Singh J. in A. I. R. 1938 Lah. 723,⁴ following 32 All. 525.⁵ Sardar Iqbal Singh states that the existence of these contrary views is confusing for the subordinate Courts, and he asks for the case to be referred to a Division Bench in order that the Courts may know what course to follow. I am myself in respectful agreement with the view taken by Dalip Singh J. and the matter is one which I should be inclined in the ordinary way to leave for further decision by way of a Letters Patent appeal. But as this is a revision, there is no further appeal, and I agree that the subordinate Courts should be in a position to know what course to follow. For these reasons, I refer the case for decision by a Division Bench. As the right of the parties to institute a fresh suit would now be defeated by limitation unless the present case is decided quickly, I recommend that arrangements should be made for the hearing of the petition at a very early date.

ORDER OF DIVISION BENCH

TEK CHAND J.—The plaintiff-respondent instituted a suit against the defendant petitioner for rendition of accounts, alleging that the defendant had acted as his agent in certain transactions and

1. ('27) 14 A. I. R. 1927 Lah. 701 : 104 I. C. 339, Hanuman Baksh v. (Firm) Balmukand-Kanka Lal.
2. ('32) 19 A. I. R. 1932 Lah. 619 : 140 I. C. 15, Kesho Ram v. Joti Sarup Goela & Sons.
3. ('99) 60 P. R. 1899 : 6 P. L. R. 1900, Jowahar Singh v. Haria Mal.
4. ('38) 25 A. I. R. 1938 Lah. 723 : 179 I. C. 418, Kanshi Ram v. Dula Rai & Co.
5. (10) 32 All. 525 : 6 I. C. 162 : 7 A. L. J. 513, Permand v. Jagat Narain.

had not rendered the account. The defendant admitted the agency but pleaded that the accounts between the parties had already been gone into and a certain sum found due by the plaintiff to him. The Court framed an issue as to whether the accounts had been gone into and for this reason the suit, as brought, was not maintainable. While enquiry into this issue was proceeding, the defendant's pleader made a statement that a preliminary decree for rendition of accounts be passed against the defendant "on the condition that if, on taking the account, it was found that the balance was in favour of the defendant, a decree be passed in his favour" on payment of the requisite court-fee. No objection having been raised by the plaintiff, the Court forthwith passed a preliminary decree for rendition of accounts in favour of the plaintiff "in terms of the statement made by the defendant's pleader." A decree-sheet was, accordingly, prepared and a local commissioner appointed to go into the accounts. After a lengthy enquiry the local commissioner reported that nothing was due to the plaintiff, but that it was the plaintiff who owed Rs. 2328-13-0 to the defendant. To this report, the plaintiff filed objections. While arguments were being heard on these objections, the plaintiff presented an application under O. 23, R. 1, Civil P. C., asking for permission to withdraw the suit with liberty to bring a fresh suit. The application was opposed by the defendant, but the learned Subordinate Judge granted it. He held that the defendant was a pakka arhti, with whom the plaintiff dealt as principal to principal, and that, in any case, in a suit by a principal against an agent it was not competent to the Court to pass a decree in favour of the defendant against the plaintiff if on taking the account it was found that the balance was in favour of the defendant. The learned Judge after holding that "the plaintiff was entitled to withdraw from proceeding with the suit" added that "the suit of the plaintiff be consequently dismissed."

The defendant has come in revision, urging that the order of the lower Court allowing the suit to be withdrawn at this stage was ultra vires and illegal. A preliminary objection is raised on behalf of the respondent that no revision lies as the order of the lower Court was one dismissing the suit and as such was appealable. In my opinion this objection has no force. As stated above, the application by the plaintiff, on which the order was passed, had been made under O. 23, R. 1 and the only relief asked for was permission to withdraw the suit with liberty to bring a fresh suit. In this application no prayer had been made for the dismissal of the suit. The Subordinate Judge had granted the application holding that in his opinion the plaintiff was "entitled to withdraw from proceeding with the suit" and had allowed him to do so with liberty to institute a fresh suit. On this application, and in view of this finding the Court could not have dismissed the suit. The words "the suit is consequently dismissed" at the end of the order appear to have been added inadvertently. They are a mere surplage and have no real meaning. The order is in fact and substance one allowing the suit to be withdrawn under O. 23, R. 1 and its real character cannot be changed by these words. Obviously, a suit cannot be allowed to be "withdrawn" and "dismissed" at the same time. A similar order had been passed by the lower Court in the case reported in A. I. R. 1939 Lah. 472⁶ and Dalip Singh J. held that the order was not appealable and that a

6. ('39) 26 A. I. R. 1939 Lah. 472 : 184 I. C. 855 : 41 P. L. R. 486, Firm Daulat Ram Vaidya Parkash v. Bansil Lal.

revision lay : see also A. I. R. 1935 Oudh 486.⁷ I would therefore overrule the objection. On the merits, I have no doubt that the order of the learned Judge allowing the suit to be withdrawn at this stage cannot be maintained on either of the grounds given by him. As has been pointed out above, a preliminary decree for rendition of accounts had been passed in the suit on 9th February 1940, and no appeal had been filed from it. This being so, the Court had no jurisdiction, in subsequent proceedings, to re-open any of the matters settled by that decree. If any authority is required for this proposition, reference may be made to 4 Pat. 618 at p. 66, where their Lordships of the Privy Council observed :

"After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless and until the decree is varied or set aside. After a decree any party can, as already stated, apply to have it enforced."

The lower Court, instead of enforcing the decree, has altogether nullified its effect by allowing the suit to be withdrawn at this stage. This it, obviously, could not do. The next ground on which the decision of the lower Court proceeds is that in a suit for rendition of accounts by the principal against the agent, if it is found that it is the plaintiff who owes a certain sum to the defendant, it is not competent to the Court to pass a decree for it in favour of the defendant against the plaintiff. In coming to this conclusion the lower Court has followed A.I.R. 1927 Lah. 701¹ and A.I.R. 1934 Lah. 708⁹ decided, respectively, by Jai Lal J., and Addison J. sitting in Single Bench. There is also another decision to the same effect by Jai Lal J. in A.I.R. 1932 Lah. 619.² The contrary view has however been taken by Dalip Singh J. in A.I.R. 1938 Lah. 723.⁴ In view of this conflict of decisions the present case has been referred to this Bench.

In the former set of rulings, it has been pointed out that, ordinarily, an agent is not entitled to institute a suit for accounts against the principal and that his suit must be for recovery of a specific sum, alleged to be due to him by the principal. From this well-settled proposition, it has been concluded that if in a suit by the principal against the agent the examination of the account discloses that the balance is in favour of the agent no decree can be passed in his favour against the principal. With great respect, I am unable to see that this conclusion follows from the premises. It is no doubt true that, normally, it is the agent, and not the principal, who is the accounting party and, therefore, the suit for rendition of accounts can be brought by the latter against the former and not vice versa. But when the principal has done so and the account has been taken, he cannot escape the consequences. The procedure in such a suit is regulated by O. 20, R. 16, Civil P. C., where it is laid down that in a suit for an account on pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary in order to ascertain the amount of money due to or from any party that

an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit. The object of taking the account being to ascertain the amount of money due to or from either party, it necessarily follows that if the result of the examination of the account is that nothing is due by the defendant (agent) to the plaintiff (principal) but, on the other hand, it is the plaintiff (principal) who owes a certain sum of money to the defendant (agent) a final decree must be passed to that effect. It is nowhere provided that, in that event, the suit shall be dismissed leaving it to the defendant (agent) to file another suit for recovery of the same amount against the plaintiff (principal).

As has been pointed out by Richards and Tudball JJ., in 32 All. 525,⁵ a suit which is in truth and in fact a suit for accounts by the principal against the defendant necessarily involves an undertaking by the plaintiff to pay to the defendant any sum that may be found due to the defendant by him on the taking of accounts and it is unnecessary that the defendant should plead a set off or counterclaim. This decision was approved by another Bench of the same High Court in 46 All. 85¹⁰ and was reaffirmed in A. I. R. 1937 All. 276,¹¹ where it was pointed out, with reference to the provisions of O. 20, R. 16, Civil P. C., that in such a suit the plaintiff necessarily runs the risk of finding that on a true account, instead of any sum being due to the plaintiff, something is due to the defendant and that in that event it is within the competence of the Court at the time of the passing a final decree to pass a decree in favour of the defendant against the plaintiff. The same has been held by the Madras High Court in 54 Mad. 654¹² at p. 659 and the Judicial Commissioner of Sind in A.I.R. 1933 Sind 247.¹³ That this is the correct view of the law would appear⁹ from the dictum of Lord Hobhouse in 14 Cal. 147¹⁴ at p. 153 (which was a suit for accounts between the principal and agent) that

"nothing could prevent the defendant in a suit framed like this from claiming the benefit of an account if in his favour, just as the plaintiff claims it if a larger sum than he specifies should be found due to him."

It must, therefore, be held that A.I.R. 1938 Lah. 723⁴ was correctly decided and the contrary view taken in A.I.R. 1927 Lah. 701,¹ A.I.R. 1932 Lah. 619² and A.I.R. 1934 Lah. 708⁹ cannot be supported. For the foregoing reasons, the order of the lower Court cannot be sustained on either of the grounds given in it. I would accordingly accept this petition for revision, reverse the order of the lower Court allowing the suit to be withdrawn, and direct the Court to proceed with the case from the stage at which it was when the application under O. 23, R. 1, Civil P. C., was made by the plaintiff. The Court shall examine the plaintiff's objections against the Commissioner's report and after taking such

7. ('35) 22 A.I.R. 1935 Oudh 486 : 156 I.C. 990 : 1935 O. W. N. 842, Jai Indra Bahadur Singh v. Deputy Commissioner, Kheri.

8. ('24) 11 A.I.R. 1924 P.C. 198 : 81 I.C. 747 : 4 Pat 61 : 51 I.A. 321 (P.C.), Lachmi Narain v. Balmukund Marwari.

9. ('34) 21 A.I.R. 1934 Lah. 708 : 152 I.C. 133 : 16 Lah. 7 : 35 P.L.R. 684, Devi Dayal v. Gopal Das Mathra Das.

10. ('24) 11 A.I.R. 1924 All. 854 : 83 I. C. 880 : 46 All. 858 : 22 A.L.J. 738, Ram Charan v. Bulaghi.

11. ('37) 24 A. I. R. 1937 All. 276 : 168 I. C. 933 : 1937 A.L.J. 115, Firm Bhawani Sahai-Saliq Ram v. Chhajju Mal.

12. ('31) 18 A.I.R. 1931 Mad. 185 : 131 I. C. 185 : 54 Mad. 654 : 62 M.L.J. 45, Annu Avathanigal v. Somasundara Avathanigal.

13. ('33) 20 A. I. R. 1933 Sind 247 : 150 I. C. 464, Wali Mahomed Shaloo v. Khoja Ismaillia Trading Co. Ltd.

14. ('87) 14 Cal. 147 : 13 I. A. 128 : 4 Sar. 751 (P.C.), Hurrinath Rai v. Krishna Kumar Bakshi.

evidence as the parties wish to produce, grant a decree to the party in whose favour the balance is found to be, on payment of the requisite court-fee; Court-fee on this revision petition shall be refunded; other costs shall be costs in the cause.

BLACKER J. — I agree.

K.S./R.K.

Revision allowed.

C. P. C. —

(a) ('40) Chitaley, S. 115, N. 7 Pt. 5 and N. 15; O. 23 R. 1, N. 28 and N. 39 Pt. 1.

('41) Mulla, Page 409, Note "In which no appeal lies." Page 958 Pts. (l) and (p) and Page 962 Pt. (r).

(b) ('40) Chitaley, O. 20 R. 16, N. 2 Pt. 5 and O. 23 R. 1, N. 10 Pts. 4-5.

('41) Mulla, Page 952 Pt. (r).

(c) ('40) Chitaley, O. 20 R. 16, N. 3 Pt. 1; O. 20 R. 19, N. 3 Pts. 3-4.

('41) Mulla, Page 735 Pt. (y) and Page 737 Pt. (h).

*** A. I. R. (29) 1942 Lahore 84**

BLACKER AND RAM LALL JJ.

Subeg Singh — Accused — Petitioner
v.

Emperor.

Criminal Revn. Petn. No. 591 of 1941, Decided on 2nd January 1942, referred to Division Bench by Blacker J., D/- 20th June 1941.

* Criminal P. C. (1898), Ss. 423 (1) (c) and (d), 403, 110 and 107 — Order under S. 110 — Appeal — Appellate Court can direct fresh inquiry—S. 403 does not apply to order under S. 110 or S. 107 : 30 P. L. R. 416=(29) 16 A.I.R. 1929 Lah. 28=115 I. C. 544, **OVERRULED**.

In the case of an appeal from an order under S. 110, the appellate Court can while reversing the order under S. 423 (1) (c) order a fresh inquiry under S. 423 (1) (d), such order being incidental within S. 423 (1) (d). Section 403 which embodies the principle of *autrefois acquit*, would not apply to proceedings for taking security either under S. 107 or S. 110, as there is no conviction of any offence and therefore in such a case there would be no legal bar to a Magistrate proceeding again against the same person even if his first order had been reversed. It would of course on this view be possible for him to do so even if the order had been reversed on the merits. But no Magistrate would take such action : 30 P.L.R. 416=(29) 16 A.I.R. 1929 Lah. 28=115 I. C. 544, **OVERRULED**; ('26) 13 A.I.R. 1926 All. 403, *Rel. on*; ('34) 21 A.I.R. 1934 Mad. 202, *Ref.*

[P 84g, h]

L. Saunders — for Petitioner.

Basant Krishen Khanna, Assistant Advocate General — for the Crown.

BLACKER J.—The material facts of this case are that one Subeg Singh was ordered by a Magistrate of the first class at Sheikhpura to be restricted to his village for one year under S. 110, Criminal P. C. He appealed to the learned District Magistrate and the District Magistrate finding that the accused had not been given an opportunity to cross examine some of the prosecution witnesses "set aside the conviction and sentence" and returned the case to the lower Court for disposal according to law. The learned Additional Sessions Judge reported the case to the High Court for revision on the ground that the District Magistrate had no jurisdiction on hearing an appeal under S. 406, Criminal P. C., to order

a de novo trial, that is to say, a learned Additional Sessions Judge on a Single Bench judgment of in A.I.R. 1929 Lah. 28.¹ The case in Single Bench. I had some correctness of this view, especially the contrary view had been held of the Allahabad High Court accordingly referred this case to

Before the Division Bench, referred to above were cited and the Madras High Court, A.I.R. decision of a Single Bench. In was taken as by the Lahore Single Bench was that the Magistrate's judgment after hearing both may say so with due respect, question of the point in A.I.R. 1 view taken was simply that it could only act under Cl. (c) of that clause gave no power to The Madras judgment, which Allahabad judgment, did not and again, in a very brief order found that S. 423 (1) (c) was the that under that the Sessions Judge or reverse the order under appeal then goes on to say that under could make any consequential just or proper. It then says that a de novo inquiry. It is difficult for this last remark especially a in that case did in fact order a he ordered the Subdivisional Magistrate and write a proper judgment

The Allahabad decision, in my the correct law. It is there point for a fresh inquiry is an incident be passed under Cl. (d) of S. 42 agree with the learned Judge section which embodies the principle of *autrefois acquit*, would not apply to security either under S. 107 or conviction of any offence. It is that in such a case there would Magistrate proceeding again against even if his first order had been of course on this view be possible if if the order had been reversed it is difficult to conceive that anyone take such action. It is clear, a Allahabad judgment, that the was necessary in Cl. (b) of S. S. 403 would completely bar It is equally obvious that the Legislature have intended that a person, proceeded against under S. 107 or released merely on account of procedure by the Magistrate. It is that the Legislature has left a would appear fairly clear that the Magistrate took the view that it was Cl. (c) of S. 423 (1) specifically the appellate Court to order a fresh trial was no provision of the law

1. ('29) 16 A.I.R. 1929 Lah. 28
30 Cr. L. J. 491 : 30 P. L. R. 416
Emperor.

2. ('26) 13 A.I.R. 1926 All. 40
Cr. L. J. 945 : 43 All. 501
Emperor v. Bhagwat Singh.

3. ('34) 21 A.I.R. 1934 Mad. 202
34 Cr. L. J. 947, In re Narappa

away that power and sub-s. (d) of S. 423 (1) gave it very wide powers to make any consequential or incidental order that might appear to it to be just or proper. It is obvious that if in the case of a person, who prima facie ought to be bound over, the order has to be reversed on account of an illegality in the proceedings, the appellate Court has to apply its mind to the question whether there should be a de novo inquiry or not, and, as pointed out by the Allahabad Court, it would then pass an order incidental to its order reversing the order for security by which it would direct either that there should be a de novo inquiry, as in this case, or, if the matter had become stale or for any other reason, that there should not be a de novo inquiry.

In this case it is unfortunate that the learned District Magistrate has used incorrect language. There was no conviction and no sentence that he could set aside. All he could do was to reverse the order and direct a fresh inquiry upon the original notice. I would, therefore, not accept the learned Additional Sessions Judge's recommendation that the order of the learned District Magistrate be set aside, but I would substitute for his order a direction that the order of the learned Magistrate be reversed under S. 423 (1) (e) and under S. 423 (1) (d) I would direct that a fresh inquiry be held on the original notice.

RAM LALL J.—I agree.

G.N./R.K.

Order accordingly.

Cr. P. C.—

(41) Chitaley, S. 403, N. 7 Pt. 5 and N. 9; S. 423, N. 35 Pt. 5 and N. 39.

(41) Mitra, Pages 208 and 209 Note "Appeal." Page 1357 Note "Clause (c)."

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SPECIAL BENCH

YOUNG C. J., DALIP SINGH AND

RAM LALL JJ.

Advocate-General, Punjab — Petitioner

v.

Pt. Mohan Lal, Pleader, Una —

Respondent.

Civil Misc. Case No. 34 of 1941, Decided on 5th May 1941.

(a) Legal Practitioners Act (1879), S. 12 — Pleader convicted of offence — In considering whether disciplinary action should be taken Court should not merely accept conviction but must consider material on which it is based.

In order to see whether disciplinary action should be taken against a pleader who has been convicted of an offence the Court should not merely accept the fact that he has been convicted but must consider the material upon which he was convicted. [P 85h]

(b) Legal Practitioners Act (1879), S. 12 — Making of speech by pleader which incites others to break law or to acts which tend to subvert order is reasonable cause to suspend or remove pleader — Moreover such speech amounts to breach of condition relating to revocation of license incorporated in licenses by Lahore High Court.

A legal practitioner is a part of the machinery provided for the maintenance of order and the enforcement of law of the land. It is, therefore, incon-

sistent with his duties as a legal practitioner to incite others either to boycott the Courts or to break the law which it is the duty of the Courts to administer; those who live by the law cannot preach the breaking of the law. The making of a speech by a legal practitioner which incites others to break the law, or an organised breach of the peace by him or incitement to acts tending to subvert order such as asking people not to pay land revenue to Government or asking them to unite and refuse to recognise Government servants and to throw off the chains of bondage is a reasonable cause for suspending or removing a legal practitioner : ('34) 21 A.I.R. 1934 Lah. 251 (S.B.), *Rel. on.* [P 85h; P 86a]

Moreover, such acts amount to a breach of the condition as to revocation of the legal practitioner's license which is incorporated by the Lahore High Court in all licenses granted to legal practitioners and therefore constitute a ground for revocation of the license or such lesser punishment as the Court sees fit to impose. [P 86b]

Basant Krishen, Assistant Advocate-General —
for Petitioner.

J. L. Kapur and Prem Chand — for Respondent.

YOUNG C. J. — This is a petition by the Advocate-General, Punjab, under S. 12, Legal Practitioners Act, praying that Pandit Mohan Lal be dismissed from practising as a pleader on the ground that he has been convicted under R. 38 read with R. 34 (6) (e) of the Defence of India Rules, 1939, that his said conviction was upheld by the High Court on revision and that the said conviction implies a defect in character which unfits him to be a pleader. Pandit Mohan Lal made a speech on the night between 13th and 14th of April 1940. The learned Magistrate accepted the prosecution case that this speech was made, and convicted him under R. 38 read with R. 34 (6) (e) and (1) of the Defence of India Rules and sentenced him to nine months' rigorous imprisonment. On appeal, the learned Sessions Judge maintained his conviction under R. 38 read with R. 34 (6) (c) but quashed his conviction under Rule 38 read with R. 34 (6) (1). A learned Single Judge of this Court rejected the application in revision by the pleader and confirmed the sentence. The principles under which disciplinary action should be taken by the Court against legal practitioners have been clearly laid down by Jai Lal J. in 15 Lah. 354¹ and in particular at p. 386. This was a Full Bench decision of this Court. The principles enunciated in this decision were five in number. The third and fourth are as follows :

"(3) that a legal practitioner is a part of the machinery provided for the maintenance of order and the enforcement of the law of the land. It is, therefore, inconsistent with his duties as a legal practitioner to incite others either to boycott the Courts or to break the law which it is the duty of the Courts to administer; those who live by the law cannot preach the breaking of the law ;

(4) that organised breach of the peace or incitement of acts tending to subvert order is a reasonable cause to suspend or remove a legal practitioner ;"

In order to see whether disciplinary action should be taken against the pleader in this case we must, therefore, not merely accept the fact that he has been convicted but we must consider the material upon which he was convicted. The speech for which he has been convicted has been translated and is quoted in full in the paper book before us. Some of

1. ('34) 21 A.I.R. 1934 Lah. 251; 149 I.C. 764 : 35 Cr.L.J. 1010 : 15 Lah. 354 : 38 P.L.R. 510 (S.B.), In the matter of Mohammad Alam Advocate.

the passages in this speech clearly incite others to break the law which it is the duty of the Courts to administer. As pointed out in the authority under consideration, those who live by the law cannot preach the breaking of the law. The pleader also by his speech incited his audience to acts tending to subvert order. For example he said "Why do you pay land revenue? The lands belong to you. You are the producers. Then how is Government entitled to the revenue" and again: "If all the brethren were to unite and refuse to recognise or obey any patwari or constable or Rai Sahib who might happen to be a Government employee you can even now throw off the chains of bondage." It is clear, therefore, that the speech comes within the mischief alluded to in the third and fourth principles laid down in 15 Lah. 354¹ at p. 386. On this ground alone, therefore, it would appear that this Court is entitled under the law to take disciplinary action against Pandit Mohan Lal. There is, however, another point. The license which was issued to Pandit Mohan Lal had this note at the bottom of it: "N. B. — This license is liable to be revoked at any time during the said period on the grounds specified in Ss. 12 and 13 of the said Act, and inter alia participation on the part of the holder in any seditious or disloyal movement will be considered reasonable cause for such revocation."

This condition was inserted in every license granted to legal practitioners on the authority of a decision at a full meeting of the Judges on 9th July 1909. From that date this condition has been incorporated in all licenses granted to pleaders. The license was granted to and accepted by the pleader, therefore, on this condition. That condition in this case has been clearly broken by the pleader and on this ground also there would be ground for revocation of the license or such lesser punishment as this Court sees fit to impose. On these two grounds, therefore, the petition of the Advocate-General must be accepted. This is a first offence and the pleader was acquitted of the charge of inciting to violence. We therefore order that the license of Pandit Mohan Lal be suspended for one year.

DALIP SINGH J. — I agree generally.

RAM LALL J. — I agree.

G.N./R.K.

Order accordingly.

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DALIP SINGH AND DIN MOHAMMAD JJ.

*Dr. Umar Bakhsh (deceased) represented
by Dr. Mohammad Din and others —
Plaintiffs — Appellants*
v.

Mul Raj — Defendant — Respondent.

Second Appeal No. 1047 of 1939, Decided on 1st December 1941, from decree of Dist. Judge, Hoshiarpur, D/- 28th March 1939.

Contract — Agreement to sell not signed by some of vendors — Validity — Question is of intention depending on circumstances of case — Sales mentioned in agreement to sell not interdependent — Fact that one of vendors did not sign agreement does not affect its validity as between vendee and vendor who had signed.

If the intention of the parties to an agreement to sell is that no body would agree to sell his share unless all the others also agreed to sell their shares it cannot be held that where one of them had failed

to sign the document, the document was a complete document. On the other hand, if the sales are not interdependent in the sense that each vendor might well have sold his share of the property without reference to the sale by others, and what really should have been a number of separate sale deeds are rolled into one because of convenience, then the fact that in the agreement to sell one of vendors had not joined would not affect its validity as between the vendee and the vendor who had signed the agreement to sell. The question of intention has to be settled by a reference to the terms of the document and to the circumstances of the case: ('21) 8 A.I.R. 1921 Nag. 66 and ('34) 21 A.I.R. 1934 Lah. 262, *Ref.* [P 875]

Malik Barkat Ali and Maulvi Ghulam Mohy-ud-Din Khan — for Appellants.

Mukand Lal Puri — for Respondent.

DALIP SINGH J. — The facts of this case are a little curious. The plaintiff sues for possession of land by specific enforcement of a contract by which the defendant had agreed to sell the land in his favour. He also claimed Rs. 1200 as damages for the failure of the defendant to convey the said land to him. This plea of damages however has been dropped before us and no further mention of it is needed. The plaintiff alleged that on 1st December 1937 a certain group of persons consisting of occupancy tenants and landlords of certain land, whose area was then about 11 kanals 2 marlas, agreed to sell him this land at a rate fixed at Rs. 142 per marla, the respective shares of the landlords and occupancy tenants being fixed at six annas and ten annas respectively. This land did not belong entirely to one group of landlords or one group of occupancy tenants. A small portion of it had only one smaller group of landlords and similarly a certain smaller group of occupancy tenants, whereas the rest of the land had the entire group of landlords and the entire group of occupancy tenants as landlords and occupancy tenants respectively.

The defendant resisted the claim on the ground that he had never agreed to sell the land, that the plaintiff insisted on the inclusion of certain stipulations in the sale deed, which were not in the agreement to sell, that the price fixed was not a fair price for the land, that the plaintiff failed to complete the agreement within the time specified and time was not of the essence of the contract, and in particular that Mt. Attar Kaur one of the vendors had not signed the agreement to sell and without her signature the document was not a complete document and could not be specifically enforced. The plaintiff replied that subsequently Mt. Attar Kaur had executed the agreement in question and therefore this plea of the defendant was of no force. The trial Court framed certain issues of which issues 5 (a) and 5 (b) are the main issues which concern us in this appeal. As regards issue 2, however, it may be briefly stated here that after looking at the plaint and the pleadings of the parties it does not seem to us to arise at all. Although it is correct that in the sale deed, which was subsequently executed by all the vendors except the present defendant, certain new stipulations have been put in, which are not in the original agreement to sell, nevertheless at no time did the plaintiff claim that the defendant should sell the land to him according to the stipulations contained in the sale deed. He all the time merely asked that the defendant should sell the land to him in accordance with the terms of the agreement to sell. Issue 2 therefore was irrelevant in the circumstances of this case.

^a As regards issue 3, the Courts below rightly held that time was not of the essence of the contract and we have not heard any argument on that subject in this Court. As regards issue 4, it is really a question which is covered by issues 5 (a) and 5 (b) because it depends on whether the defendant has to abide by the terms of his agreement to sell or not. Issue 5, which related to damages, as already pointed out, has been dropped in this Court. The trial Court held issues 5 (a) and 5 (b) against the plaintiff on the authority in 64 I. C. 726¹ and A.I.R. 1934 Lah. 262.² In the latter ruling a sale deed, which was not signed by one of the vendors, was held to be inoperative as an instrument of sale on the facts and circumstances of that particular case. As regards 64 I. C. 726,¹ it was pointed out there and in the rulings on which it is based that the matter was one of the intention of the parties. If the intention of the parties in this document had been that nobody would agree to sell his share unless all the others also agreed to sell their shares, the matter would ex necessitate be different. In such a case it could not be held that where one of them had failed to sign the document, the document was a complete document. On the other hand, if the sales were not interdependent in the sense that each vendor might well have sold his share of the property without reference to the sale by others, and what really should have been a number of separate sale deeds were rolled into one because of convenience, then the fact that in the agreement to sell one of the vendors had not joined would not affect the question as between the vendee and the vendor who had signed the agreement to sell. The question of intention has to be settled by a reference to the terms of the document and to the circumstances of the case.

^c On the whole, after considering the facts and circumstances in this case and the terms of the document and the subsequent conduct of the parties, I am definitely of opinion, that the agreement to sell did not depend on the joint execution of it by all the parties. Each vendor really intended to sell his own share at a particular rate fixed in the document and it was not an imperative necessity that each of the parties should carry out the sale or should agree to sell to a particular vendee. No doubt, it was to the interest of the vendee that all should join in the sale, but qua the vendors it was a matter of total indifference to them whether all joined in the sale or whether they did not. I therefore do not see that the failure of Attar Kaur to sign the agreement to sell can possibly affect the question of specific performance between the plaintiff vendee and the present defendant. It is an admitted fact that the present defendant vendor had signed the agreement to sell.

^d I would therefore accept the appeal and hold that the plaintiff is entitled to enforce specific agreement of the contract to sell, dated 1st December 1937. The plaintiff will have to deposit the balance of price according to the terms of that agreement to sell on or before 3rd January 1942 in the trial Court for payment to the defendant. The defendant will then execute within a fortnight of the deposit of the money the sale deed required according to the terms of the agreement. If he does not do so, the Court will draft a sale deed and enforce the sale on his behalf. It was alleged, however, in the plaint that the defendant had received Rs. 208-5-0 as his share of the earnest money and that the balance of price

due to him was Rs. 1508-5-0 only. Counsel for the defendant-respondent has no instructions on this point at all. If there is any dispute on this point, the Court will frame an issue and take the necessary evidence of the parties and extend the time for deposit, if necessary, to the plaintiff, and may similarly extend the time for the defendant to execute the sale deed. In the circumstances, I would leave the parties to bear their own costs throughout.

DIN MOHAMMAD J.—I agree.

G.N./R.K.

Appeal accepted.

A. I. R. (29) 1942 Lahore 87

TEK CHAND AND BLACKER JJ.

Raja Ram—Decree-holder — Appellant
v.

Lehna and another — Judgment-debtors }
— Respondents.

Exn. First Appeal No. 29 of 1940, Decided on 12th December 1941, from order of Senior Sub-Judge, Sadar Jhang, D/- 21st December 1939.

(a) Res judicata—Constructive — Finding in execution as to amount of debt due is final between same parties in subsequent proceedings.

An order of the executing Court that the amount due from the judgment-debtor is more than a certain amount (i.e. beyond the jurisdiction of the Debt Conciliation Board) is binding on the parties by the rule of constructive res judicata in subsequent proceedings : 6 All. 269 (P.C.), *Rel. on.* [P 88d]

(b) Punjab Relief of Indebtedness Act (7 of 1936), S. 25—Civil Court has power to hold that order of Board is without jurisdiction.

The Civil Court has full power to hold that the order of the Debt Conciliation Board was without jurisdiction and, if it does so hold, should ignore it : ('41) 28 A.I.R. 1941 Lah. 234 (F.B.), *Foll.*

[P 88d,e]

(c) Civil P. C. (1908), O. 41, R. 22—Decision on point not appealed from nor cross-objection filed—Such decision cannot be attacked.

Order 41, R. 22 gives a respondent power only to support the decision of the lower Court; not to attack it. Hence he has no right to raise a point in an appeal against a decision he has not appealed or even put in cross-objection : ('29) 16 A.I.R. 1929 Lah. 684, *Rel. on.* [P 88e]

(d) Punjab Debtors' Protection Act (2 of 1936), S. 9—"Subsequent holder"—Widow of deceased proprietor.

A widow of a deceased proprietor is not a subsequent holder of his estate within the meaning of S. 9. [P 88f]

Indar Dev Dua — for Appellant.

Mohammad Amin — for Respondents.

BLACKER J. — This is an execution first appeal against the order of the Senior Subordinate Judge of Jhang directing the execution proceedings to be suspended until such time as the decree-holder has instituted a suit for a declaration that the order of the Debt Conciliation Board dated 8th April 1938 was without jurisdiction and is not binding on the appellant. The material facts are that the appellant Raja Ram got a simple money decree on 29th January 1934, against the respondents Lehna and Mt. Saban widow of Ahmad for Rs. 7600. The appellant filed a number of execution applications and eventually the Court sent the papers to the Collector for a tem-

1. ('21) 8 A.I.R. 1921 Nag. 66 : 64 I. C. 726, Ramchandra v. Ruprao.

2. ('34) 21 A.I.R. 1934 Lah. 262 : 151 I. C. 462 : 35 P. L. R. 316, Mt. Walayat Jan v. Jamal Din.

porary alienation of the land of the judgment-debtors. In the meanwhile Lehna had applied for the settlement of his debts, including the present one, to the Debt Conciliation Board which sent the usual rokkar to the Civil Court for staying proceedings. On 8th October 1937 the Court found that the debts were over Rs. 10,000 and that the proceedings of the Debt Conciliation Board were without jurisdiction and its rokkar, therefore, ineffective. In the meanwhile, on 8th April 1938, as stated above, the Debt Conciliation Board discharged all the debts on the ground that none of the decree-holders had produced statements of accounts required by law. The judgment-debtor Lehna then put in objections before the Collector, who referred the matter to the Civil Court for decision. The Civil Court in its order dated 16th November 1939, now before us in appeal, relying upon the decision of a Division Bench of this Court reported in A.I.R. 1938 Lah. 702,¹ held that a Civil Court had no jurisdiction to go behind the order of the Debt Conciliation Board. It, therefore, ordered that the decree-holder be given a chance to prove in a Civil Court that the order passed by the Debt Conciliation Board discharging his debt was not legally tenable and that in the meanwhile the execution proceedings should remain suspended. This order was followed by a subsequent order dated 21st December 1939, continuing the suspension of the execution proceedings on the ground that the decree-holder had not so far instituted a suit.

In appeal before us, counsel for the appellant raised two points, the first being that the order of 8th October 1937, was binding on the parties under the rule of constructive res judicata and that the Court should not have reviewed its order merely on account of the subsequent Division Bench ruling. His second point was that the Division Bench ruling relied upon by the Court has been overruled by a Full Bench decision in A. I. R. 1941 Lah. 234.² Counsel also contended that even if the whole matter were not, in any case the fact that the debts exceeded Rs. 10,000 is res judicata. He also argued that it was established on the record that the debts exceeded Rs. 10,000 and gave a list of seven decrees against these judgment-debtors, which were sent by the Court to the Collector at the same time as the present decree. These decrees amounted to Rupees 19,684-8-0. It appears that there are probably more decrees against the judgment-debtors. His last contention was that the other side never challenged the fact that the debts exceeded Rs. 10,000. Counsel for the respondents has contested the proposition that the amount of the debts was res judicata. His argument, however, appears to be without force. It clearly follows from the principles laid down in 6 All. 269³ that the finding that the debts exceeded Rs. 10,000 having been taken in the same execution proceedings between the same parties, is binding on them by the rule of constructive res judicata. In any case the evidence that the debts did exceed Rs. 10,000 is not even rebutted by an affidavit. We are, therefore, of opinion that the finding that the debts exceeded this amount is final. As regards the second point, the law is now, as laid down in A.I.R. 1941 Lah. 234,² that the civil Court has full power

to hold that the order of the Debt Conciliation Board was without jurisdiction and, if it does hold, should ignore it. Counsel for the respondent attempted to raise a further point namely that the decision of the civil Court, that the responder have not been proved to be governed by custom a that the land was not proved to be ancestral, was wrong. He relied upon S. 9, Punjab Debtors' Protection Act, 1936, for holding that if the land was ancestral and the respondents were governed custom, the land cannot be attached in execution of a money decree.

There are, however, two clear answers to this contention. The first is that the respondents have right to raise this point in this appeal not having appealed against the decision of the lower Court, even put in cross-objections. Order 41, R. 22, Civ. P. C., gives them power only to support the decision of the lower Court; not to attack it. There is ample authority for this view in the judgment cited A.I.R. 1929 Lah. 684.⁴ Besides this, however, the conditions necessary for the application of S. Debtors' Protection Act, 1936, would only have been satisfied if the respondents were "subsequent holders" to the persons who incurred the debt. The debt was incurred by Lehna himself and Ahm: deceased husband of Mt. Saban. 39 P. R. 1915⁵ a clear authority for the view that a widow of deceased proprietor is not a subsequent holder in his estate in this sense. We are, therefore, of the opinion that the view of the Court that it could not ignore the order of the Debt Conciliation Board was wrong and we accordingly accept the appeal with costs, set aside the order of the lower Court suspending the execution proceedings and direct it to continue the proceedings according to law.

K.S./R.K.

Appeal allowed.

4. ('29) 16 A.I.R. 1929 Lah. 684, Kisan Kishore v. Din Muhammad.

5. ('15) 2 A.I.R. 1915 Lah. 281 : 29 I. C. 572 : 3 P. R. 1915 : 8 P. L. R. 1916, Bhambul Devi v. Narain Singh.

C. P. C.—

(a) ('40) Chitaley, S. 11, N. 23 Pt. 5.

('41) Mulla, Page 89 Pt. (v).

(c) ('40) Chitaley, O. 41 R. 22, N. 2 Pt. 4.

('41) Mulla, Page 1179 Pt. (c).

* A. I. R. (29) 1942 Lahore 88

SALE J.

*Jhanda — Decree-holder — Petitioner
v.*

*Nikka, Judgment-debtor and another
Sapurdar — Respondents.*

Civil Revn. Petn. No. 134 of 1941, Decided on 15th December 1941, for revision of order of Judge Small Cause Court, Lahore, D/- 11th February 1941

*Civil P. C. (1908 as amended by Punjab Act 12 of 1940), S. 60 (1) (cc) — Words "belonging to agriculturist" qualify "open spaces or enclosures" — S. 60 (1) (cc) exempts all milch animals whether belonging to agriculturist or not.

The words in S. 60 (1) (cc) "belonging to an agriculturist" qualify only the words "open spaces or enclosures." The words "belonging to an agriculturist" must be read in conjunction with the words immediately following "and required for use in case of need for tying cattle," and the phrase "belong-

1. ('38) 25 A.I.R. 1938 Lah. 702 : 181 I. C. 743 : 41 P. L. R. 203 : I.L.R. (1938) Lah. 720, Gopal Dass v. Firm Seth Khushi Ram Behari Lal.

2. ('41) 28 A.I.R. 1941 Lah. 234 : 198 I. C. 125 : I. L. R. (1941) Lah. 524 : 48 P. L. R. 383 (F. B.), K. L. Gamba v. Punjab Cotton Press Co. Ltd.

3. ('84) 6 All. 269 : 11 I. A. 37 (P. C.), Ram Kirpal v. Rup Kauri.

ing to an agriculturist and required for use in case of need for tying cattle" must be read as a whole. Such a qualification can only apply to "open spaces or enclosures," and not to the description of the animals preceding. Therefore, S. 60 (1) (cc) makes all milch animals exempt whether they belong to an agriculturist or not. [P 89 C 1]

Chaudhri Fazal Din — for Petitioner.

Ashgar Beg — for Respondent 1.

Respondent 2 in person.

JUDGMENT. — Some buffaloes were attached from a Sapurdar, Allah Ditta, in execution of a decree for Rs. 187 obtained by the petitioner Jhanda against the respondent Nikka from the Court of the Judge Small Causes, Lahore. The learned Judge decided that the buffaloes were not liable to attachment under S. 60, Civil P. C., as amended, and from this decision the decree-holder has petitioned in revision. The material amendment to S. 60 is cl. (cc) inserted in sub-s. (1) of S. 60 by Act 12 of 1940, so that the material part of S. 60 now reads as follows: "Provided that the following particulars shall not be liable to such attachment or sale, namely :

(cc) Milch animals, whether in milk or calf, kids, animals used for the purposes of transport or draught carts, and open spaces or enclosures belonging to an agriculturist and required for use in case of need for tying cattle, parking carts, or stacking fodder or manure."

There was, according to the order of the learned Judge, an admission made before him by counsel for the decree-holder to the effect that "the exemptions under S. 60, Civil P. C., can be availed of even by the Sapurdar." It is explained in revision that this admission was made subject to the qualification that the Sapurdar is an agriculturist, since it is contended that the exemptions in question can be availed of only by an agriculturist, and it is argued that the Sapurdar in this case, Allah Ditta, who describes himself as a Sheikh, is not an agriculturist within the meaning of the statute. Counsel for the judgment-debtor contends however that the words in (cc) "belonging to an agriculturist" qualify only the words "open spaces or enclosures" and I think that this interpretation is correct. The words "belonging to an agriculturist" must be read in conjunction with the words immediately following "and required for use in case of need for tying cattle", and the phrase "belonging to an agriculturist and required for use in case of need for tying cattle" must be read as a whole. Such a qualification can only apply to "open spaces or enclosures", and not to the description of the animals preceding. I therefore hold that the amendment (cc) makes all milch animals exempt whether they belong to an agriculturist or not. On this interpretation the decision of the learned Judge releasing these buffaloes from attachment is correct. The petition fails and is dismissed. I make no order as to costs.

G.N./R.K.

Petition dismissed.

A. I. R. (29) 1942 Lahore 89

YOUNG C. J. AND BECKETT J.

Fatnaya Lal Khan and others

Convicts — Appellants

v.

Emperor.

Criminal Appeal No. 641 of 1941, Decided on 3rd October 1941, from order of Addl. Sess. Judge, Bhahpur at Sargodha, D/- 12th May 1941.

1942 L/12 & 13

(a) Criminal P. C. (1898), Ss. 172 and 174 — Police officer suffering from lapse of memory as to presence of blood stains or injuries—Court inviting him to refresh his memory by reference to memorandum prepared by him in course of investigation—Police officer is under obligation to do so—Consequences of failure, stated.

It is true that an accused is not entitled to call for the police diaries unless a police officer uses them to refresh his memory, or the Court uses them for the purpose of contradicting a witness. But it is not open to a witness to decide for himself whether or not he should disclose a material fact which might turn the scale in deciding whether an accused person was guilty or innocent, when he is in a position to clear up a point by reference to any notes taken by him during the course of investigation. If a police officer figuring as a prosecution witness suffers from a lapse of memory which can be remedied by reference to any memorandum prepared by him at the time, and the Court invites him to refresh his memory with reference to the writing, the witness is under an obvious obligation to do so, this being part of the duty under which he lies to lay the whole truth before the Court to the best of his ability. Should the police officer refuse to assist the Court in this way he would not only be failing in his duty both as a witness and as an officer of public justice, but would also be liable to exactly the same penalty as any other witness who refuses to give evidence which is within his knowledge and is not affected by any particular claim of privilege. It is possible that a diary of steps taken by the police in course of investigation may contain confidential matters which would not in the public interest be disclosed and for which privilege might be claimed, but no such question can arise when it is merely a question of the presence of blood stains or injuries. There is nothing in S. 174 to suggest that it was ever intended that information on any such point should be deliberately withheld if it should happen to be in any way necessary for the decision of the case: 8 Cal. 154 and 8 Cal. 739, *Not approved*; (21) 8 A.I.R. 1921 All. 86 and (24) 11 A. I. R. 1924 Pat. 829, *Rel. on*.

[P 91 C 1, 2]

(b) Penal Code (1860), S. 362 — Grown up woman—Carrying away of, by force against her will even with object of restoring her to her husband is unlawful.

In the case of a grown up woman it would be an offence to carry her away by force against her own will even with the object of restoring her to her husband. [P 92 C 1]

(c) Penal Code (1860), S. 141 — Assertion of supposed right by show of force is sufficient to constitute unlawful assembly.

Even the assertion of a supposed right, if the right is to be asserted by a show of force, is sufficient in itself for constituting an unlawful assembly.

[P 92 C 1]

(d) Penal Code (1860), S. 149—Scope — Body of heavily armed men setting out to take woman back by force—One of party committing murder —All members of party are guilty of murder.

In order that S. 149 should come into effect the offence need not be committed in direct prosecution of the common object of the assembly; it is sufficient that the offence should be such that the members of the assembly knew it to be likely to be committed. When a body of heavily armed men set out to take a woman back by force they must be taken to have known that some one was likely to be killed before

the day was over. Consequently in such a case if one of the party commits murder all the members of the party must be held either directly or constructively guilty of murder : ('15) 2 A. I. R. 1915 Lah. 418; 4 W. R. Cr. 26 and ('15) 2 A. I. R. 1915 All. 281, *Approved*. [P 92 C 1]

Sir Abdül Qadir, Mohd. Yusaf Khan for Mohd. Amin Khan and Mohd. Amin Khan —

for Appellants.

A. G. Maurice for Advocate-General —

for the Crown.

BECKETT J.—This is a case in which six persons have been directly or constructively found guilty of two murders which took place when a number of armed men were engaged in carrying away a woman of their own family from the man with whom she was living. Of these persons Ramzan has been sentenced to transportation for life only, on account of his age, although he took a principal part in the transaction, and Khan Muhammad, who took a less important part in the transaction, has been given the same sentence. The other four accused have been sentenced to death. In addition, there are lesser convictions and sentences in respect of other incidents which took place during the same transaction. All six accused have appealed, and the death sentences are before us for confirmation. The preliminary facts are not seriously in dispute. Mt. Mariam, the cause of the trouble, was married to Ramzan, accused, a boy some years younger than herself. She only lived with her husband for a short time and then left him to stay with her brothers, with whom she had been living before her marriage. Soon after this she ran away with Gul Sher, one of the two murdered men, with whom she had already formed an intimacy after the marriage. Ramzan first tried to recover his wife by using the process of criminal law; and this ended in a compromise whereby Ramzan was to be given another girl in exchange for his wife. Unfortunately, the girl who was eventually to be exchanged happened to be married to a minor husband, and there was some difficulty over the question whether a minor husband could grant a valid divorce to his wife. While these negotiations were going on, Gul Sher took Mt. Mariam to live with him at Ghah Kilianwala in the Shahpur district where his own family resides; and there she gave birth to an illegitimate child. Soon after this event, according to the prosecution story, Gul Sher and Mt. Mariam were sitting at home in the afternoon in company of men and women belonging to Gul Sher's family, including his brother Naza, who had taken a prominent part in the negotiations over compromise and was responsible for raising the difficulty over the question whether a divorce could be given by a minor husband or not. While they were sitting thus, they suddenly received a warning that from fifteen to twenty men were riding down the road armed with spears and other dangerous weapons. This party included Ramzan, his father Khan Muhammad and other persons who were on the side of Ramzan. Naza is said to have adopted a conciliatory attitude, suggesting that the matter could be easily settled and pleading that they were all members of the same brotherhood. To this Fatnaya, a senior member of the raiding party, replied that the brotherhood had come to an end, and forthwith plunged his spear into Naza's abdomen. Ramzan followed this up by piercing the chest of Gul Sher. Other injuries were also inflicted on these two men. Mt. Mariam took refuge in a room, but was dragged out and placed upon a camel which the accused had brought with them. She was taken away and kept in

hiding for some time, but was even produced before the police. In the end Gul Sher died as a result of the injuries sustained, after their dying declaration recorded on the day following the occurrence was made to the person named Naza on the evening itself.

All the accused denied having had any alibi in the abduction of Mt. Mariam. Evidence was produced in the Sessions Court and no reliance has been placed upon appeal, in which arguments have been confined to a criticism of the evidence, combined with a suggestion that the evidence may have been carried off by the accused whose feelings had been equally excited and whom the prosecution some unexplained reason, now wish to object to. The first objection is that the prosecution produce certain material evidence which has been produced, for the purpose of the oral evidence with regard to the attack was carried out. In this particular objection was taken to the evidence of the Sub-Inspector of Police who was giving his evidence, and the evidence of decisive importance in the circumstances of this case, it seems to us that it is sufficiently well founded to deserve on general grounds. One matter which the defence desired to have cleared up was whether there were signs of struggle on the spot. In view, the Sub-Inspector was asked whether there were any marks of blood of occurrence. The Sub-Inspector could not say whether he had noticed or not. This in itself was not unusual as there was an unfortunate delay in the case and his evidence was not recorded more than a year after the fight had taken place. The Sub-Inspector was then asked whether any note at the time in the police diary to the presence of blood-stains. He could not say whether he made any note. When further pressed, he said he was prepared to consult the diaries. It was observed that the Sub-Inspector was asked a question on a similar point, but he was prepared to look up what was in his diary. He also took up what was described as a distinctly prevaricating answer in regard to the questioning of Mt. Mariam produced before the police at another

The attitude of the Sub-Inspector based upon the view taken by the Calcutta in two cases decided in 8 Cal. 154¹ and 8 Cal. 739.² Other cases, however, have not taken the same view, therefore, necessary to examine whether the Sub-Inspector was or was not refused to refresh his memory by consulting diaries in a case of this kind. Both cases relate to the production of statements which have been made by witnesses during the investigation, to which the defence for the purpose of contradicting the

1. ('82) 8 Cal. 154 : 10 C.L.R. 51, Churn Chunari.
2. ('82) 8 Cal. 739 : 12 C. L. R. 2, Jhubboo Mahton.

by the same witnesses in Court. The view taken in 8 Cal. 154¹ was based upon the wording of S. 126, Criminal P. C., as then in force, which corresponded with S. 172 of the present Code, the wording being much the same. Since the accused was not entitled to call for the police diaries, though he was entitled to see them if a witness used them for the purpose of refreshing his memory, it was apparently considered undesirable that an attempt should be made to obtain access to their contents by the indirect means of asking a witness to refresh his memory by reference to them. The decision in 8 Cal. 739² seems to have been based upon quite different grounds. It was there held that, although reference had been made to the police diary, what was really meant was the statements of witnesses attached thereto; and since the particulars which S. 126 required to be recorded in the police diaries did not include any original statement taken down under S. 119 (as it then was), the statement was not necessarily a part of the diary which a police officer was required to keep under S. 126, so that the provisions of that section would not apply.

A different view of the matter was taken by a Division Bench of the High Court of Allahabad in A. I. R. 1921 All 86.³ In that case a Sub-Inspector of police was unable to remember the precise nature of the injuries on the persons of the accused when they were brought before him, and when asked to consult any memorandum on the point he might have made at the time of his investigation, he refused to do so. It was held that if a witness suffers from a lapse of memory, which can be remedied by reference to any memorandum prepared by him at the time, and the Court invites him to refresh his memory with reference to the writing, the witness is under an obvious obligation to do so, this being part of the duty under which he lies to lay the whole truth before the Court to the best of his ability. No reference was made to the Calcutta judgment, however, and the provisions of the Code of Criminal Procedure were not discussed. A similar view was taken in A. I. R. 1924 Pat. 829,⁴ where it was held that the Court in such circumstances should require a witness to refresh his memory when such refreshment seems necessary. Here again, the case law on the subject was not discussed.

After a consideration of these judgments, we are in respectful agreement with the view expressed by the High Court of Allahabad. A witness is under an obligation to disclose the whole truth to the best of his ability; this obligation is, if anything, heavier when the witness is a police officer whose duty it is to act as an officer of public justice. So far as the statements of witnesses are concerned, the question may be no longer one of more than academic interest in view of the amended provisions of S. 162 of the Code; but here we are concerned only with such matter as may properly be regarded as forming part of the diary. It is possible that a diary of steps taken by the police in course of investigation may contain confidential matters which could not in the public interest be disclosed and for which privilege might be claimed, but no such question can arise when it is merely a question of the presence of bloodstains or injuries, which are matters of common knowledge in the case, and it is only desired to secure the best possible evidence on the point. Nor does there seem to us to be anything in the wording of S. 174 which

suggests that it was ever intended that information on any such point should be deliberately withheld if it should happen to be in any way necessary for the decision of the case. It is true that the accused is not entitled to call for these diaries unless a police officer uses them to refresh his memory, or the Court uses them for the purpose of contradicting a witness; but if it was anticipated that a police officer would ordinarily seek to fulfil his duty as a witness by consulting any memorandum for the purpose of refreshing his memory on any material point, then the section would surely have been framed on this assumption and the fact that it might be necessary to require a witness to refresh his memory would not have been regarded as contrary to what was intended by the section as a whole. In other words, it seems to us impossible to hold that it was ever intended to leave it to a witness to decide whether or not he should disclose a material fact which might turn the scale in deciding whether an accused person was guilty or innocent, when he is in a position to clear up a point by reference to any notes taken by him during the course of investigation. Should a police officer refuse to assist the Court in this way, it seems to us that he would not only be failing in his duty both as a witness and as an officer of public justice, but would also be liable to exactly the same penalty as any other witness who refuses to give evidence which is within his knowledge and is not affected by any particular claim of privilege.

In this case fortunately it does not seem to us that the decision of the case is dependent on the evidence thus withheld by the investigating Sub-Inspector. It is known that Mt. Mariani was carried off from Chali Kilianwala and that two men were killed in the transaction. The oral evidence which has been produced may be open to criticism on minor points of detail: but it is not necessary to go into this evidence at length in order to decide whether the discrepancies are merely due to the effect of the time which had elapsed since the occurrence on the memory of the witnesses or whether this interval has been used in order to improve the prosecution case. As already mentioned, the statements of the two murdered men were recorded on the day following the fight. One of these was recorded in hospital, and in neither instance is there any substantial ground for suspecting that they may have been improperly recorded. Both may have distinctly named the principal assailants and it seems quite inconceivable that they should have falsely implicated Ramzan and his party if they had in fact received their injuries from the brothers of Mt. Mariani. The affair took place in full daylight, so that there would be no difficulty in recognising any of the assailants whose faces were already known, and negotiations had already been proceeding between the two parties. It has been suggested that, as often happens in cases of this kind, there would be a tendency to implicate as many persons as possible. There seems to be no doubt, however, that a large number of men took part in the abduction; but of these persons only a fairly small number were named. What is more, Gul Sher went out of his way to make it impossible for his relatives to yield to temptation of implicating any more persons among the accused, by definitely stating that none of the other members of the party could be recognised at the time. In these circumstances, we consider that all the present appellants have properly been found to have participated in the abduction.

An attempt has been made to argue that the theory of collective responsibility for murders should

3. (21) 8 A. I. R. 1921 All. 86 : 65 I. C. 575 : 23 Cr. L. J. 143; 19 A. L. J. 76, Harkhu v. Emperor.

4. (24) 11 A. I. R. 1924 Pat. 829, Mohiuddin Khan v. Emperor.

a not be applied to those of the accused who had not inflicted any fatal injury with their own hands, since spears and similar weapons might have been taken only with the object of overawing the other side and not with any intention that injuries should be actually inflicted. It has also been suggested that the accused should not be regarded as an unlawful assembly, since they were only trying to take back the woman who was still married to Ramzan and who had left him without any justification. As regards the second point, it is sufficient to remark that Mt. Mariam was a grown up woman, and it would be an offence to carry her away by force against her own will even with the object of restoring her to her husband; and further, that even the assertion of a supposed right, if the right is to be asserted by a show of force, is sufficient in itself for constituting an unlawful assembly. As regards the former point, there is a sufficient body of authority against the argument now put forward. In order that S. 149, Penal Code, should come into effect the offence need not be committed in direct prosecution of the common object of the assembly; it is sufficient that the offence should be such that the members of the assembly knew it to be likely to be committed; and it is a matter of common knowledge that, in any village of the North-Western Punjab, when a body of heavily armed men set out to take a woman back by force, some one is likely to be killed before the day is over. In 16 P. R. Cr. 1915⁵ it was held that members of a party setting out heavily armed for the purpose of committing dacoity must know that there is every likelihood of something occurring to interfere with their criminal plans and that the deliberate intention of the party is to use their arms, wherever necessary, so that if arms are used on the way, all the members of the party are collectively c responsible. As long ago as 1865 it was held that where two members of an unlawful assembly used spears and deliberately pierced another person through the chest and abdomen, with the knowledge that death was likely to ensue, all the members of the unlawful assembly were held guilty of murder : see 4 W. R. (Cr.) 26.⁶ 13 A. L. J. 470⁷ is another case on the subject, where a number of persons, two of whom were armed with pistols, set out to abduct women and a person was shot in prosecution of the common object, it was held that the obvious inference to be drawn was that the pistols were intended to be used, if necessary, to overcome any resistance that might be offered and that the members of the gang knew that murder was very likely to be committed, so that they were constructively guilty of murder even if they were not murderers.

d It has been urged that the present case is not quite on the same lines since Naza had adopted a conciliatory attitude, so that the act of Fatmaya in thrusting a spear into him was merely wanton; but the attitude adopted by Fatmaya (who was not directly interested) is indicative of the spirit of the party taken by Ramzan, and it seems to us that the accused must have known when they set out in the company of Ramzan, that some such incident was likely to occur. For these reasons we consider that all the accused must be held to be either directly or constructively guilty of murder. As already men-

tioned, Ramzan has been given the lesser penalty of transportation for life, although directly responsible a for one of the two deaths. Khan Mohammad has also been given the lesser penalty. Both of these appeals are dismissed. The second person directly responsible for murder is Fatmaya. We are unable to hold that there are any extenuating circumstances in his case in view of the fact that his assault on Naza was entirely unprovoked. His appeal is also dismissed, and the sentence of death is confirmed. As regards the other accused, it does not seem necessary to us to impose the major penalty for a constructive liability of this kind, when they were presumably acting in the exercise of a supposed right, and it does not appear that any of them personally set out with the deliberate intention of causing death. While their convictions are upheld, the sentences passed on Ghulam Muhammad, Muhammad Nawaz and Jahana are reduced to transportation for life. To this extent only the appeals f are accepted. The lesser convictions and concurrent sentences passed on the appellants will stand as they are. A copy of this judgment should be sent to the Provincial Government with reference to the use of investigation diaries by police officers.

G.N./R.K.

Order accordingly.

Cr. P. C.—

(a) ('41) Chitaley, S. 172 N. 6, Pt. 6 and N. 7.

('41) Mitra, Page 555 N. 538.

Penal Code—

(b) ('38) Ratanlal, Page 865 Note "who ever by force . . . means induces."

('36) Gour, Page 1198 N. 4123.

(c) ('36) Ratanlal, Page 331 Pt. 12.

('36) Gour, Page 503 N. 1346.

(d) ('36) Ratanlal, Page 350 Note "Scope," Page 352 Pt. 6 and Note "culpable homicide." g

('36) Gour, Page 520 N. 1421 and Page 521 Pt. 5.

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ABDUL RASHID J.

*Mt. Akbari Begum — Plaintiff —**Appellant*

v.

*Zafar Hussain — Defendant —**Respondent.*

Second Appeal No. 328 of 1941, Decided on 15th December 1941, from decree of Dist. Judge, Delhi, D/- 21st December 1940.

(a) Dissolution of Muslim Marriages Act (1939), S. 2 (iv) — Findings that husband had not failed without reasonable cause to perform marital obligations for three years and had not assaulted wife are of fact. k

Findings that the husband had not failed, without reasonable cause, to perform his marital obligations, for a period of three years and that he had not assaulted the wife are findings of fact which cannot be agitated in second appeal. [P 93 C 1]

(b) Interpretation of Statutes—Unambiguous words must be given effect to.

Where the words of the statute are unambiguous, effect must be given to them whatever the consequences. [P 93 C 2]

(c) Dissolution of Muslim Marriages Act (1939), S. 2 (ii) — Husband failing to maintain wife for two years—Wife is entitled to dissolution of marriage whatever be cause of hus-

5. ('15) 2 A. I. R. 1915 Lah. 418 : 30 I. C. 737 : 16 P. R. Cr. 1915 : 16 Cr. L. J. 689, Dhian Singh v. Emperor.

6. (1865) 4 W. R. Cr. 26, Queen v. Nazoo Fakir.

7. ('15) 2 A.I.R. 1915 All. 281 : 29 I. C. 91 : 16 Cr. L. J. 459 : 13 A. L. J. 470, Rasul Khan v. Emperor.

band's failure and even if wife contributed towards that failure.

The words "without reasonable cause" do not occur, in S. 2 (ii) and therefore whatever the cause may be the wife is entitled to a decree for the dissolution of her marriage, if the husband fails to maintain her for a period of two years, even though the wife may have contributed towards the failure of the maintenance by her husband. Simply because the wife refused to receive a cheque sent by the husband, the husband is not relieved of all liabilities that attach to his status by virtue of S. 2 (ii) : ('41) 28 A.I.R. 1941. Lah. 167, *Rel. on.* [P 93 C 2]

Barkat Ali — for Appellant.

Dr. Khalifa Shuja-ud-Din — for Respondent.

JUDGMENT. — This appeal has arisen out of an action brought by Mt. Akbari Begum against her husband, Zafar Hussain for the dissolution of her marriage under S. 2, Dissolution of Muslim Marriages Act, 1939. The trial Court granted the plaintiff a decree on the grounds that the husband had neglected to provide for the wife's maintenance for a period of two years, that the husband had failed to perform, without reasonable cause, his marital obligations for a period of three years, that he had actually assaulted her and made her life miserable by cruelty, and that he had more than one wife and did not treat the plaintiff in accordance with the injunctions of the Quran. The defendant preferred an appeal in the Court of the learned District Judge. The lower appellate Court reversed the decision of the Court of first instance and dismissed the plaintiff's suit. Against this decision Mt. Akbari Begum has preferred a second appeal to this Court. The learned District Judge has held that the husband had not failed, without reasonable cause, to perform his marital obligations, for a period of three years, and that the husband had not assaulted the wife. These are questions of fact which cannot be agitated in second appeal. I, therefore, did not allow Mr. Barkat Ali, the learned counsel for the appellant, to re-agitate these questions in this Court.

The learned District Judge has held that the husband sent Rs. 20 to the wife on 15th December 1936, and that he sent a further sum of Rs. 50 by means of a crossed cheque on 3rd March 1937. The cover containing the crossed cheque was refused by the wife. On these facts the learned District Judge found that the husband had not failed to provide for the maintenance of the wife for a period of two years. The present suit was instituted on 21st November 1939, and the last payment by the husband to the wife was said to have been made on 3rd March 1937. For a period of about two years and four months the husband did not make any effort to provide for his wife. This was probably due to the fact that the wife had refused to receive any money from the husband by refusing the envelope containing the crossed cheque dated 3rd March 1937. Mr. Barkat Ali contended strenuously that it was the duty of the husband, as the law at present stands, to make an effort to provide for his wife every two years; it was open to him to send a money order every two years and, if the wife refused it, it could not be said that the husband had failed to provide for the maintenance of his wife for a period of two years. As matters stand, from 3rd March 1937, till 21st November 1939, the husband made no effort to provide for his wife and this entitled the wife under cl. (ii) of S. 2 to obtain a decree for the dissolution of her marriage under the Dissolution of Muslim Marriages Act. Reference was made in this connexion to a Single Bench ruling of this Court reported in

A.I.R. 1941 Lah. 167.¹ It was held in that case that there was "nothing in the wording of S. 2 (ii) to suggest that the failure to maintain wife must be wilful. Divorce can be granted on grounds which do not necessarily involve any deliberate default on the part of the husband. It is absolutely immaterial whether the failure to maintain is due to poverty, failing health, loss of work, imprisonment or to any other cause whatsoever."

Dr. Shuja-ud-Din contended, on behalf of the respondent, that as the wife had refused to receive the crossed cheque dated 3rd March 1937, there was no failure on the part of the husband to provide for her maintenance. It was her own act which made it impossible for the husband to provide for his wife. The learned counsel contended that if it is the act of the wife herself which prevents the husband from maintaining her for a period of two years the wife is not entitled to get a decree for the dissolution of the marriage, while if it is the act of the husband which results in no maintenance being provided for the wife for a period of two years she is entitled to a dissolution of her marriage. In the reported case it was due to the fact that the husband had been imprisoned that the wife failed to get any maintenance. It was not on account of any act of the wife that the maintenance failed.

Where the words of the statute are unambiguous, effect must be given to them whatever the consequences. It is laid down expressly in cl. (iv) of S. 2 that where the husband has failed to perform without reasonable cause his marital obligations for a period of three years the wife is entitled to a dissolution of her marriage. In cl. (ii), however, the words "without reasonable cause" do not occur. It must, therefore, be held that whatever the cause may be the wife is entitled to a decree for the dissolution of her marriage, if the husband fails to maintain her for a period of two years, even though the wife may have contributed towards the failure of the maintenance by her husband. It may be mentioned, however, that in this case the wife did not make it impossible for the husband to send her a crossed cheque every two years or to remit some money to her by means of a money order every six months or so. Simply because the wife refused to receive the cheque dated 3rd March 1937, the husband was not relieved of all liabilities that attached to his status by virtue of cl. (ii) of S. 2 of the Act. For the reasons given above I accept this appeal, set aside the judgment and the decree of the learned District Judge and restore that of the trial Court dissolving the marriage of Mt. Akbari Begum with Zafar Hussain. Having regard to all the circumstances of the case I order that the parties shall bear their own costs throughout.

G.N./R.K.

Appeal accepted.

1. ('41) 28 A.I.R. 1941 Lah. 167 : 194 I. C. 567, *Manak Khan v. Mt. Mulkhan Bano.*

C. P. C. —

- (a) ('40) Chitaley, Ss. 100 & 101, Note 52 Pts. 1-4.
- ('41) Mulla, Page 367 Pt. (g).
- (b) ('40) Chitaley, Preamble, Note 7 Pt. 2.

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TEK CHAND J.

Kishan Chand—Defendant—Appellant
v.*Mohammad Husain, Plaintiff and*
another, Defendant—Respondents.

Second Appeal No. 1739 of 1940, Decided on 15th May 1941, from decree of Senior Sub-Judge, Gujranwala, D/- 13th August 1940.

(a) Limitation Act (1908), S. 5 — "Sufficient cause" — Appeal filed in wrong Court in good faith owing to mistaken advice given by pleader — Held sufficient cause.

On the mistaken advice given by the pleader who was not conversant with a recent notification, the party filed the appeal in the wrong Court in good faith :

Held that there was sufficient cause within the meaning of S. 5 and the time taken in transmitting the appeal from such Court to the proper Court should be excluded : ('18) 5 A. I. R. 1918 P. C. 135 and ('17) 4 A. I. R. 1917 P. C. 156, *Followed*; *Case law referred.* [P 94 C 2]

(b) Limitation Act (1908), S. 5 — "Sufficient cause" — Question of existence of sufficient cause on facts found is one of law.

Where the relevant facts have been found, the question whether these facts are such as to constitute sufficient cause becomes a question of law : (1920) A. C. 1 and (1930) A. C. 503, *Rel. on.* [P 95 C 1]

C. D. Aggarwal—for Appellant.

Asadullah Khan and Bashir Ahmad —

for Respondents 1 and 2, respectively.

JUDGMENT.—The Subordinate Judge at Wazirabad, District Gujranwala, passed a decree in this suit on 17th October 1939. An application for copies of the judgment and decree was made on 26th October 1939 and the copies were ready the same day. The "time requisite" for obtaining the copies was, therefore, one day only and the appellant thus had 31 days from the date of the decree within which to appeal to the District Court. This period was to expire on 17th November 1939, and on that day the appellant actually lodged the memorandum of appeal in the Court of the District Judge, Sialkot, who is ex officio Additional District Judge for Gujranwala and in whose Court all civil appeals from Wazirabad tehsil of Gujranwala district used to be preferred in accordance with instructions issued by the High Court in 1936. The District Judge, Sialkot, duly received the memorandum of appeal and, on the same day, he forwarded it to the District Judge, Gujranwala, who, in turn, sent it to the Senior Subordinate Judge, Gujranwala, who had been invested with enhanced powers to hear appeals up to certain pecuniary limits from the decrees of all Subordinate Judges in Gujranwala District.

Before the Senior Subordinate Judge, the appellant filed an application stating that the appeal had been presented properly in the Court of the District Judge, Sialkot, but that if it be held that the only Court in which the appeal could be presented was that of the Senior Subordinate Judge, Gujranwala, the time taken in the transmission of the appeal to that Court from the District Court, Sialkot, i. e., from 17th to 23rd November, be excluded under S. 5, Limitation Act. Along with the application, an affidavit by Lala Kishen Gopal, pleader, Gujranwala, was filed stating that it was on advice given by him

that the appeal had been presented in the District Court, Sialkot. The learned Senior Subordinate Judge has not accepted this prayer and holding that the appeal must be taken to have been presented properly on the 23rd November 1939 when the memorandum was actually received in his Court, has dismissed it as time-barred.

It is common ground, that from February 1936 till the beginning of November 1939 all civil appeals from Wazirabad tahsil were filed in the Court of the District Judge, Sialkot, who is ex officio Additional District Judge for Gujranwala. This was in accordance with orders passed by the High Court on 14th February 1936. On 1st November 1939, however, a notification was issued under S. 39 (3), Punjab Courts Act, investing the Senior Subordinate Judge, Gujranwala, with enhanced appellate powers and declaring that the Court of the Senior Subordinate Judge shall be deemed to be the District Court for the purposes of all appeals so preferred. This notification was received in Gujranwala on 3rd November and a copy was sent to the Bar Room on 4th November 1939. This was thirteen days before the presentation of the present appeal. The learned Senior Subordinate Judge is of the opinion that Lala Kishen Gopal must have been aware of the notification and that even if the appeal was presented in the District Court at Sialkot on advice given by him, as stated in his affidavit, the appeal is none the less time-barred and the appellant cannot have the benefit of S. 5.

Before me, it has been strenuously contended that the effect of the notification issued by the High Court on 1st November 1939 under S. 39 (3) Punjab Courts Act, was not to invest the Senior Subordinate Judge with exclusive jurisdiction to entertain and hear appeals from the decrees of Subordinate Judges in Wazirabad tehsil and that the Court of District Judge, Gujranwala, who is the primary Court of appeal for the District, and that of District Judge, Sialkot, who is ex officio Additional District Judge for Gujranwala were not divested of their jurisdiction. It is maintained that both these Courts and the Senior Subordinate Judge, Gujranwala, had concurrent jurisdiction and that it was only a matter of internal arrangement that the appeals from Wazirabad were, after the 1st November to be heard by the Senior Subordinate Judge alone. The appellants' learned counsel has contended that A. I. R. 1936 Lah. 575¹ which lays down the contrary, and the rulings which follow it, were not correctly decided. This contention is not without force and I may state that doubts have been entertained about the correctness of the ruling cited but I do not think it necessary to go further in the matter in this case, as I am of opinion that the appeal must succeed on the other point.

Assuming that the appeal could have been presented only in the Court of the Senior Subordinate Judge, Gujranwala, but the appellant filed in the wrong Court acting upon mistaken advice given by his pleader, this, in the circumstances, amounts to 'sufficient cause' within the meaning of S. 5, and the time taken in transmitting the appeal from the District Court, Sialkot, to the Senior Subordinate Judge, Gujranwala, should have been excluded. The matter is concluded by the decision of their Lordships of the Privy Council in 43 Bom. 376² and 104

1. ('36) 23 A. I. R. 1936 Lah. 575 : 164 I. C. 440 : 38 P. L. R. 990, *Jiwan v. Sant Singh*.

2. ('18) 5 A. I. R. 1918 P. C. 135 : 52 I. C. 897 : 43 Bom. 376 : 46 I. A. 15 (P. C.), *Sunderbai v. Collector, Belgau*.

P. R. 1917³ and the earlier rulings like 118 P. R. 1908,⁴ 13 I. C. 714⁵ and 15 I. C. 170⁶ in which the contrary had been held are no longer good law : see also 44 All. 636,⁷ 45 Bom. 607,⁸ 48 Bom. 442⁹ and A.I.R. 1936 Lah. 575.¹ As pointed out by Macleod C. J., in 45 Bom. 607⁸ at p. 609 :

"I think that the appellant was entitled to rely upon the advice of his pleader that the appeal lay to the High Court and a party cannot be said to be acting without good faith because he relies upon a person whose status entitled him to give advice to litigants. It may be that the pleader ought to have known that the appeal lay to the District Judge. But there again some questions may appear to be so entirely free from doubt to one person, that only one opinion is possible, and yet another may equally well come to a different conclusion. I do not think it can be said that the appellant has acted in such a way that he should be debarred from his right to appeal."

In the present case there is nothing to indicate that the appeal was not filed in the Sialkot Court in good faith and it is significant that a cross-appeal by one of the parties to the suit (Ghulam Haidar and others) against this very decree of the Subordinate Judge, Wazirabad, was also preferred in the Court of the District Judge, Sialkot, on 17th November 1939.

Mr. Asadullah Khan for the respondent urged that the question whether there was or was not "sufficient cause" is a question of fact, on which the finding of the lower appellate Court must be taken to be final. But this is not so. As observed by Lord Parmoor in (1920) A. C. 110 at p. 81 in construing similar words in the English Statute, "no doubt the relevant facts should be found by the learned Judge and then it becomes a question of law whether these facts are such as to constitute reasonable cause within the provisions of the Statute." This dictum was cited with approval by Lord Chancellor Sankey in the House of Lords in (1930) A. C. 503¹¹ at p. 508 and must be taken to be conclusive on the point.

I hold, therefore, that the period of six days (17th to 23rd November) should, in the circumstances, be excluded, and that the appeal was not time-barred. I accept the appeal, set aside the judgment and decree of the Senior Subordinate Judge and remand the case to him with the direction that the appeal be restored at its original number, and heard on the

3. ('17) 4 A. I. R. 1917 P. C. 156 : 42 I. C. 43 : 45 Cal. 94 : 44 I. A. 218 : 104 P. R. 1917 (P. C.), Brij Inder Singh v. Lala Kanshi Ram.

4. ('08) 118 P. R. 1908, Sant Singh v. Qaim.

5. ('12) 13 I. C. 714 (Lah.), Lal Singh v. Pala Singh.

6. ('12) 15 I. C. 170 : 205 P.W.R. 1912, Mt. Harnam Kaur v. Sohan Singh.

7. ('22) 9 A. I. R. 1922 All. 490 : 68 I. C. 812 : 44 All. 636 : 20 A. L. J. 674 (F. B.), Shib Dayal v. Jagannath Prasad.

8. ('21) 8 A.I.R. 1921 Bom. 302 : 60 I. C. 744 : 45 Bom. 607 : 23 Bom. L. R. 89, Dattatraya Sitaram v. Secy. of State.

9. ('24) 11 A. I. R. 1924 Bom. 399 : 80 I. C. 862 : 48 Bom. 442 : 26 Bom. L.R. 395, Nagindas Motilal v. Nilaji Moroba Naik.

10. (1920) 1920 A. C. 1 : 88 L. J. K. B. 889 : 1919 W.O. & I. Rep. 241 : 121 L.T. 587 : 63 S. J. 661 : 35 T.L.R. 622, King v. Port of London Authority.

11. (1930) 1930 A.C. 503 : 99 L.J.P.C. 101 : 1930 W. C. & I. Rep. 129 : 1930 So. L. T. 397 : 143 L. T. 200 : 74 S. J. 400 : 46 T. L. R. 354, Shotts Iron Co. v. Fordyce.

merits. Court-fee on this appeal shall be refunded, other costs shall be costs in the cause. Both counsel have been directed to cause their clients to appear before the Senior Subordinate Judge, Gujranwala, on 23rd June, when a date for further proceedings will be given.

K.S., R.K.

Appeal accepted.

Limitation Act —

(a) ('41) Chitaley, S. 5, N. 13 Pt. 7.

('38) Rustomji, Page 94 Pt. 6 and Page 110 Pt. 3.

(b) ('41) Chitaley S. 5, N. 6.

C. P. C. —

('40) Chitaley, Ss. 100 & 101, N. 32 Pt. 1.

('41) Mulla, Page 370 Pt. (u).

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FULL BENCH

DALIP SINGH, DIN MOHAMMAD AND
BLACKER JJ.

*Firm Shaw Hari Dial and Sons,
Madras through H. R. Bagdy —
Defendant — Appellant*

v.

*Messrs. Sohna Mal Beli Ram through
Arjan Dass — Plaintiffs —*

Respondents.

Letters Patent Appeal No. 68 of 1941, Decided on 6th January 1942; case referred by Dalip Singh and Din Mohammad JJ., D/- 6th November 1941 from order of Monroe J., in F. A. No. 158 of 1940, D/- 30th January 1941.

* (a) Letters Patent (Lahore), Cl. 10 — Word "judgment" in Cl. 10 is not synonymous with decree — Whether order amounts to "judgment" within Cl. 10 — Test — Order determining forum in which suit is to be tried is judgment within Cl. 10.

The word "judgment" in Cl. 10 is not synonymous with decree. Clause 10 contemplates orders other than judgments in a decree. Whether an order amounts to a "judgment" within Cl. 10 must be considered on the facts and circumstances of each case and the tests propounded in 35 Mad. 1 (F. B.), and 17 W.R. 364, serve as a good guide : ('25) 12 A.I.R. 1925 P. C. 155; ('23) 10 A.I.R. 1923 P. C. 148 and ('21) 8 A. I. R. 1921 P. C. 80, *Expl.*; *Case law reviewed.* [P 100 C 1]

An order determining the forum in which the suit is to be tried amounts to a judgment within Cl. 10 and is therefore appealable. [P 97 C 1; P 100 C 1]

(b) Letters Patent (Lahore), Cls. 10 and 29 — Word "judgment" in Cl. 10 and words "final judgment" in Cl. 29 — Distinction.

The word "judgment" in Cl. 10 is not the same as the words "final judgment" in Cl. 29.

[P 99 C 1]

* (c) Letters Patent (Lahore), Cl. (10) — Order refusing to transfer suit is judgment : 8 Lah. 681 = ('27) 14 A.I.R. 1927 Lah. 540 = 102 I. C. 843, *OVERRULED.*

An order refusing to transfer a suit is a judgment within the meaning of Cl. 10 and therefore is appealable : 8 Lah. 681 = ('27) 14 A.I.R. 1927 Lah. 540 = 102 I. C. 843, *Explained and OVERRULED*; 35 Mad. 1 (F. B.), *Applied.* [P 99 C 2]

* (d) Letters Patent (Lahore), Cl. 10 — Order registering decree as that of revenue Court

under S. 100, Punjab Tenancy Act, is "judgment": 17 Lah. 606=(36) 23 A. I. R. 1936 Lah. 785=166 I. C. 292, **OVERRULED**.

An order registering a decree as that of a revenue Court under S. 100, Punjab Tenancy Act, is a judgment within Cl. 10 and hence is appealable: 17 Lah. 606=(36) 23 A.I.R. 1936 Lah. 785=166 I. C. 292, *Explained and OVERRULED*; 35 Mad. 1 (F.B.), *Applied*. [P 100 C 1]

(e) Civil P. C. (1908), S. 104 — Applicability.

Section 104 obviously applies only to appeals from orders and not to appeals from decrees. [P 99 C 2]

Achhru Ram and Darbari Lal — for Appellant.

Jagan Nath Aggarwal, M. C. Sud and A. R. Aggarwal — for Respondents.

ORDER OF REFERENCE

DALIP SINGH & DIN MOHAMMAD JJ.

— In this case the trial Court had held that it had no jurisdiction to hear the suit because the contract was made in Madras, payment was made in Madras and it appears that delivery also had to be made in Madras. On this ground, it returned the plaint for presentation to proper Court. An appeal was taken from this order to a learned Judge in Single Bench. It appears that the learned Judge held in agreement with the trial Court that the contract was made in Madras: he held that it was not proved that payment was to be made in Madras and, therefore, the Courts in Wazirabad had jurisdiction to hear the suit. He, therefore, accepted the appeal. The present appellant has come in Letters Patent Appeal and it was contended on the merits on his behalf that the trial Court in holding that the contract was made in Madras had relied on the evidence of one Barkat Ram who was held to be the agent of the plaintiff in the present suit. As regards payment being made in Madras, the trial Court had relied on the evidence of the same Barkat Ram supported by another person and on certain circumstantial evidence. The learned Judge has dealt with the circumstantial evidence but has not stated why while he accepted the evidence of Barkat Ram on the question of the contract being made at Madras in agreement with the trial Court, he apparently rejected it without mentioning it on the question whether payment had also to be made at Madras. It was further stated by the learned counsel for the appellant that on this point at the hearing the learned Judge had refused to hear him on the ground that he was satisfied as to the question of payment being made at Madras. The learned counsel for the respondent, Mr. Mehr Chand Sud, agrees that this did happen at the hearing.

Be that as it may, a preliminary objection has been taken that the order of the learned Judge not being a judgment is not appealable on this point. There is considerable controversy in all the High Courts in India which has raged for a very long time. In our Court itself the matter appears to have led to divergent decisions by Division Benches. I need only cite briefly 1 Lah. 343,¹ 3 Lah. 188,² A.I.R. 1922 Lah. 185,³ A.I.R. 1924 Lah. 412⁴ and

1. ('20) 7 A. I. R. 1920 Lah. 326 : 55 I. C. 933 : 1 Lah. 348 : 79 P. L. R. 1920, Gokul Chand v. Sanwal Das.

2. ('22) 9 A. I. R. 1922 Lah. 380 : 67 I. C. 388 : 3 Lah. 188, Ruldu Singh v. Sanwal Singh.

3. ('22) 9 A.I.R. 1922 Lah 165 : 77 I. C. 327, Firm Badri Das Jankidas v. Mathanmal.

4. ('24) 11 A. I. R. 1924 Lah. 412 : 71 I. C. 324, Nanak Chand v. Sajjad Hussain.

A.I.R. 1928 Lah. 904.⁵ On the other hand, there is 17 Lah. 606,⁶ where the learned Judges appear to be inclined to accept the definition given in the Full Bench of the Rangoon High Court in 13 Rang 457.⁷ In these circumstances we consider that this case should be decided by a larger Bench, if possible five Judges, as the matter is by no means free from difficulty and, as stated above, has led to conflicting decisions throughout the various High Courts in India and Burma.

ORDER OF FULL BENCH

DALIP SINGH J. — The point arising in this case is whether a certain order made by a learned Judge in Single Bench is or is not a judgment within the meaning of Cl. 10, Letters Patent. The facts of this case are given in the referring order and need only be briefly summarised here. The trial Court on a suit brought by the plaintiff held that it had no jurisdiction and returned the plaint for presentation to the proper Court. On appeal to this Court, a learned Judge in Single Bench held that the Court had jurisdiction and directed it to proceed with the suit. From this order a Letters Patent appeal was taken to this Bench and a preliminary objection was raised that the order in question did not amount to a judgment. As there were judgments of this Court which were difficult to reconcile and the subject itself has been a matter of controversy in the Courts in India for a long time and as the controversy has not yet been settled and as further it was contended that the controversy had been settled by decisions of their Lordships of the Privy Council the Letters Patent Bench decided to refer the matter to a Full Bench in order to secure an authoritative decision on the point. In the course of the arguments which have been very ably and fairly conducted on both sides we have been referred to the rulings on the subject of all the different High Courts. I will briefly proceed to mention these decisions and I take first the Calcutta High Court. The classical decision on the point is that contained in 17 W. R. 364⁸ where the following definition was attempted of the word 'judgment.' Couch C. J. stated :

"We think that 'judgment' in Cl. 15 (corresponding to Cl. 10 of our Letters Patent) means a decision which affects the merits of the question between the parties determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary and an interlocutory judgment determines only a part of it leaving other matters to be determined."

This definition has been generally accepted in the Calcutta High Court but while the definition has been accepted its scope has been considerably widened so that some of the learned Judges in more recent cases have remarked that the Calcutta High Court while paying lip service to this definition actually and generally disregarded it in practice as being not comprehensive enough and have gradually drifted to the definition given in 35 Mad. 1⁹ a Full Bench of

5. ('28) 15 A.I.R. 1928 Lah. 904 : 111 I. O. 274 : 10 Lah. 132 : 29 P.L.R. 571, Shibba Mal v. Rup Narain.

6. ('36) 23 A. I. R. 1936 Lah. 785 : 166 I. C. 292 : 17 Lah. 606 : 88 P. L. R. 611, Tola Ram Singh v. Fazal Ahmad.

7. ('35) 22 A.I.R. 1935 Rang. 267 : 157 I.C. 1107 : 13 Rang. 457 (F.B.), Dayabhai Jiwandas v. A. M. M. Murgappa.

8. ('72) 17 W.R. 364 : 8 Beng.L.R. 433, Justices of the Peace for Calcutta v. Oriental Gas Co., Ltd.

9. ('12) 35 Mad. 1 : 8 I.C. 340 : 21 M.L.J. 1 (F.B.), Tuljaram Row v. Allagappa Chettiar.

the Madras High Court : see the observations in this connexion in 39 C. W. N. 155¹⁰ at page 158 and 43 C. W. N. 697¹¹ at p. 724. There is one Calcutta case to which I consider special reference should be made, namely, 13 Beng. L. R. 91¹² at p. 101. There the question was whether an order refusing to set aside an order granting leave to sue to the plaintiff under Cl. 12, Letters Patent, was a judgment or not. In this case Couch C. J. who was responsible for the definition given in 17 W. R. 364⁸ stated as follows:

"It is not a mere formal order or an order merely regulating the procedure in the suit but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have. And it may fairly be said to determine some right between them, namely the right to sue in a particular Court and to compel the defendants who are not within its jurisdiction to come in and defend the suit, and if they do not, to make them liable to have a decree passed against them in their absence."

I conclude from this that the author of the definition which has been accepted whether actually or formally by the Calcutta High Court considered that an order determining the forum of the Court in which the suit was to be tried was an order affecting the rights and liabilities of the parties in the suit. This is exactly the case in the present circumstances. The order of this Court has determined the forum in which the suit is to be tried and therefore according to the definition of the Calcutta High Court as interpreted by its own author, this order would be a judgment within the meaning of Cl. 10, Letters Patent, corresponding to Cl. 15 of the Calcutta Letters Patent. I will therefore not proceed to any further analysis of the Calcutta judgments except to mention that we were referred to 4 Cal. 531,¹³ 43 Cal. 857¹⁴ and 44 Cal. 804¹⁵ in this connexion. In the last mentioned case, namely 44 Cal. 804¹⁵ at page 915 Mookerjee J. remarked that the definition given in 17 W. R. 364⁸ while quite correct so far as it went was not comprehensive and there might be orders which would be judgments though they did not fall within the four corners of the definition attempted in 17 W. R. 364.⁸

I next take up the Bombay High Court. We were referred to the following cases: 2 I.C. 157¹⁶ and 45 Bom. 428.¹⁷ In both these cases 17 W. R. 364⁸ was followed. 56 Bom. 237.¹⁸ This was an appeal

from an order fixing a date of sale and it was held that no appeal lay. In I.L.R. (1938) Bom. 704¹⁹ an order setting aside an abatement was held not to be a judgment and 17 W. R. 364⁸ was followed. In I.L.R. (1940) Bom. 361²⁰ the order excusing a delay in filing an appeal was held not to be a judgment. Two Judges delivered judgments but emphasis was laid on the fact that the proceedings had not terminated by this order and therefore it could not be said to be a final order or a judgment. Hence, according to those learned Judges, both under the definition in 35 Mad. 1⁹ and in 17 W. R. 364⁸ the order was not a judgment. I do not think it is necessary to enter into any detailed analysis of these judgments.

I next come to the Allahabad High Court. The Allahabad High Court as pointed out in the commentary of Mulla on the Civil Procedure Code in Edn. 10 at p. 1351 at first held that the Letters Patent were controlled by S. 104 and O. 43 R. 1, Civil P. C., corresponding to S. 588 of the old Civil Procedure Code. It has subsequently been pointed out that this view having regard to the change of the wording of S. 104 could not possibly now be considered correct. The earlier Allahabad decisions, therefore, need not detain us. In 45 All. 662²¹ the definition given in 35 Mad. 1⁹ was followed, and an order setting aside an abatement was held to be appealable. In 48 All. 684²² again 35 Mad. 1⁹ was followed and A.I.R. 1925 P. C. 155²³ was explained as referring only to Cl. 39 of the Letters Patent of that Court and to govern only appeals to the Privy Council. All these cases, however, were set aside by 57 All. 983²⁴ a Full Bench ruling of the Allahabad High Court where 35 Mad. 1⁹ was dissented from and it was stated that their Lordships of the Privy Council had settled the question by the decision in A.I.R. 1925 P. C. 155.²³ This view has since prevailed in the Allahabad High Court. I come now to the Madras High Court. The earliest case of Madras to which we have been referred is 3 M. H. C. R. 384.²⁵ It is unnecessary to dwell on this case because it is universally now conceded that that case went too far in defining 'judgment' as any order which affected some right or liability of the parties. The classic definition so far as Madras is concerned is given in 35 Mad. 1⁹ by Sir Arnold White, C. J. and this definition has really never seriously been departed from in Madras. In this case Sir Arnold White, C. J. stated as follows:

"The test seems to me to be not what is the form of the adjudication but what is its effect in the

10. ('35) 22 A. I. R. 1935 Cal. 35: 154 I. C. 1056 : 39 C. W. N. 155, Lea Badin v. Upendra Mohan Roy.
11. ('38) 43 C. W. N. 697, Ernest Bruno Nier v. George Reinhart.
12. ('74) 18 Beng. L. R. 91 : 21 W. R. 303, Hadjee Ismail v. Hadjee Mahomed.
13. ('79) 4 Cal. 531 : 3 C. L. R. 311, Ebrahim v. Fackhrunnissa Begum.
14. ('16) 3 A.I.R. 1916 Cal. 361 : 34 I. C. 634 : 43 Cal. 857: 23 C.L.J. 443 : 20 C.W.N. 594, Mathura Sundari Dasi v. Haran Chandra Saha.
15. ('18) 5 A.I.R. 1918 Cal. 850 : 39 I. C. 465 : 44 Cal. 804 : 25 C. L. J. 193 : 21 C. W. N. 269 : 18 Cr. L. J. 497, Budhu Lal v. Chattu Gope.
16. ('09) 11 Bom. L. R. 241 : 2 I. C. 157, Miya Mahomed Haji Jan Mahomed v. Zorabi.
17. ('21) 8 A.I.R. 1921 Bom. 320 : 59 I.C. 533 : 45 Bom. 428 : 22 Bom.L.R. 1169, Charandas Chaturbhuj v. Chhaganlal Pitambardas.
18. ('32) 19 A.I.R. 1932 Bom. 134 : 137 I. C. 456: 56 Bom. 237 : 34 Bom. L. R. 12, Ibrahimbhai Fazalbhay v. Yousuf Ismailbhay.

19. ('38) 25 A.I.R. 1938 Bom. 408 : 177 I. C. 734: I.L.R. (1938) Bom. 704 : 40 Bom. L. R. 658, Maria Flaviana Almeida v. Ramchandra Santuram. k
20. ('40) 27 A.I.R. 1940 Bom. 196 : 189 I. C. 79 : I.L.R. (1940) Bom. 361 : 42 Bom. L. R. 377, Vajrayantappa Shirasappa v. Anasuya.
21. ('23) 10 A.I.R. 1923 All. 44 : 70 I. C. 305 : 45 All. 66 : 20 A. L. J. 801, Sadiq Ali v. Anwar Ali.
22. ('26) 13 A.I.R. 1926 All. 669 : 96 I. C. 666 : 48 All. 684 : 24 A. L. J. 892, Ishwari Prasad v. Sheotahal Rai.
23. ('25) 12 A.I.R. 1925 P. C. 155 : 87 I. C. 313 (P.C.), Sevak Jeranchood Bhogilal v. Dakore Temple Committee.
24. ('35) 22 A.I.R. 1935 All. 620 : 157 I. C. 347 : 57 All. 983 : 1935 A. L. J. 681 (F. B.), Mt. Shabzadi Begam v. Alakh Nath.
25. ('66-67) 3 M. H. C. R. 384, DeSouza v. Coles.

suit or proceeding in which it is made. If its effect whatever its form may be and whatever be the nature of the application on which it is made is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent. I think too an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment but with a view to rendering the judgment effective if obtained) e.g., an order on an application for an interim injunction, or for the appointment of a receiver is a 'judgment' within the meaning of the clause."

This definition has been followed in 47 Mad. 136²⁶ and in 50 Mad. 380.²⁷ I now pass on to consider the Rangoon High Court. We were referred to the following cases, 6 Rang. 703,²⁸ 11 Rang. 19,²⁹ 13 Rang. 457⁷ and A.I.R. 1941 Rang. 227.³⁰ It is unnecessary to go in any detail into these rulings except 13 Rang. 457⁷ which has settled the view of Rangoon. In a Court consisting of seven Judges Page C. J. expressed the view that the matter was not open to any controversy now by reason of three decisions of their Lordships of the Privy Council reported in A.I.R. 1925 P. C. 155,²³ 47 Bom. 724³¹ and 48 Cal. 481.³² Some reference was also made to the Privy Council decision in 11 Rang. 58.³³ This decision, however, need not detain us as the decision was merely whether a certain order was appealable to the Privy Council under S. 109, Civil P. C., and their Lordships of the Privy Council held that the order in that case not being a final order was not so appealable. We have also been referred to a decision of the Federal Court reported in A.I.R. 1939 F. C. 43.³⁴ In that case Sir Shah Sulaiman expressed the view that no appeal lay and he referred to his own judgment in 57 All. 983²⁴ which has already been

referred to as laying down what, according to that learned Judge, was the decision of the Privy Council in A.I.R. 1925 P. C. 155.²³ It is sufficient here merely to note that the other two Judges of the Federal Court, namely, the Chief Justice and Varadachariar J. do not seem to have accepted this view for they proceeded to admit and decide on the appeal but no reasons were given in the judgment of Varadachariar J. and the only brief reference in the judgment of the learned Chief Justice was that no narrow construction should be put upon the word 'judgment' and it is unnecessary to go at length into this case.

I now proceed to consider the cases of our own High Court. The earliest case is that reported in 1 Lah. 348¹ where an order refusing stay of execution was held appealable. The next case is the main decision on this point and is reported in 3 Lah. 188² at p. 191. There the learned Chief Justice Sir Shadi Lal stated that in his opinion the best definition of 'judgment' so far attempted was contained in 35 Mad. 1.⁹ Without, however, laying down that even that definition was entirely comprehensive that learned Judge proceeded to lay down that it must be considered in the circumstances of each case whether the order amounts to a judgment or not though the test afforded by the Madras decision was probably the best test obtainable. In A.I.R. 1922 Lah. 185³ the same definition was followed, the judgment again being by Sir Shadi Lal. Similarly, in A. I. R. 1924 Lah. 412⁴ the same principles were applied. In 10 Lah. 132⁵ Sir Shadi Lal and Broadway JJ., considered the meaning to be given to the Privy Council decision in A.I.R. 1925 P. C. 155.²³ The learned Judges there pointed out that the counsel in the case were unable to explain why their Lordships of the Privy Council having held that the appeal to His Majesty in Council should not have been admitted proceeded to allow the appeal and set aside the judgments or decrees on the ground that these judgments were incompetent. Their Lordships, however, also further pointed out that the judgment in question obviously referred to Cl. 39 corresponding to Cl. 29 of our Letters Patent and was only dealing with the words 'final judgment' contained in that clause and not with the word 'judgment' in Cl. 10 of our Letters Patent corresponding to Cl. 15 of the Letters Patent of the High Courts of Calcutta, Bombay and Madras. I think it is fairly clear that what their Lordships of the Privy Council in this case meant was that the appeal to His Majesty in Council should not have been admitted by the High Court on the ground that it was admitted, namely, that a substantial question of law was involved between the parties. Their Lordships of the Privy Council allowed the appeals on the ground that the appeal to the High Court was itself incompetent and therefore the orders passed on appeal by their Lordships of the High Court were not passed in the exercise of any jurisdiction conferred on them and were, therefore, mere waste paper, and hence the acceptance of the appeal. Great stress has been laid on the fact that in this case their Lordships of the Privy Council expressed themselves as follows:

"The term 'judgment' in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense."

If by these words their Lordships had intended to set at rest the controversy which had aged for over 70 years in the Indian High Courts on the meaning of the term 'judgment' in Cl. 10 of our Letters Patent or Cl. 15 of the Letters Patent of Calcutta, Bombay and Madras then following the usual practice of their Lordships, their Lordships

26. ('24) 11 A.I.R. 1924 Mad. 90 : 73 I. C. 1054 : 47 Mad. 136 : 45 M. L. J. 153, Krishna Reddy v. Thanikachala Mudali.

27. ('27) 14 A.I.R. 1927 Mad. 398 : 100 I. C. 157 : 50 Mad. 380 : 52 M. L. J. 161, Govinda Ramanuja Pedda v. Tiruvengada Krishnamacharlu.

28. ('29) 16 A.I.R. 1929 Rang. 41 : 114 I. C. 524 : 6 Rang. 703 (F.B.), Chidambaram Chettyar v. N. A. Chettyar Firm.

29. ('33) 20 A.I.R. 1933 Rang. 15 : 142 I. C. 58 : 11 Rang. 19, Raman Chettyar v. Bank of Chettinad Ltd.

30. ('41) 28 A.I.R. 1941 Rang. 227 : 196 I. C. 470 : 1941 R.L.R. 694 (F.B.), Nagoor Gani v. A. K. A. C. T. A. L. C. Chettyar.

31. ('23) 10 A.I.R. 1923 P. C. 148 : 74 I. C. 469 : 47 Bom. 724 : 50 I. A. 212 (P.C.), Tata Iron and Steel Co. v. Chief Revenue Authority.

32. ('21) 8 A.I.R. 1921 P. C. 80 : 60 I. C. 274 : 48 Cal. 481 : 48 I. A. 76 (P.C.), Mt. Sabitri Thakurain v. Savi.

33. ('33) 20 A.I.R. 1933 P. C. 58 : 142 I. C. 328 : 11 Rang. 58 : 60 I. A. 76 (P.C.), Abdul Rahman v. D. K. Cassim & Sons.

34. ('39) 26 A.I.R. 1939 F. C. 43 : 181 I. C. 317 : I.L.R. (1939) Kar. 132 : 1939 F. C. B. 159, Hori Ram Singh v. Emperor.

would have expressed the fact that they noticed the controversy and intended to set it at rest and would not merely have proceeded in a casual sentence in a judgment which did not deal with this point at all to have laid down the proposition that they have laid down. Their Lordships, it must be remembered, were in that case dealing with the question of the right to appeal to the Privy Council. The clause which gives that right contains the word 'final judgment'. In Cl. 10 the word is used without any qualifying adjective at all. Following the usual rule of construction of statutes it would be impossible to hold unless driven to it that the word 'final' was merely a superfluity in Cl. 29 of our Letters Patent. There seems to be obviously some distinction between the words 'final judgment' and the word 'judgment.' I am fortified in this view by the construction of the term of Cl. 10 of our own Letters Patent which reads as follows :

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court."

If the word 'judgment' meant only a decree what would be the point of excluding a judgment in respect of a decree or order. It seems to me clear, therefore, that orders other than judgments in a decree are contemplated by Cl. 10 of the Letters Patent. I do not think, therefore, that A.I.R. 1925 P. C. 155²³ should be interpreted in the sense that the Allahabad and the Rangoon High Courts have interpreted it. I may point out that apart from what was stated in 10 Lah. 132⁵ much the same view about this judgment was expressed in 50 Mad. 380²⁷ and in 55 All. 326.³⁵ I, therefore, do not consider that this judgment has overruled all the previous definitions given in the Indian High Courts whether of Calcutta or of Madras which have so long held the field. The next Privy Council case to which reference was made in the Rangoon judgment in 13 Rang. 457⁷ is 47 Bom. 724.³¹ I am quite unable to see how this case can be held to be any authority for the interpretation of the word 'judgment' in Cl. 10 of our Letters Patent. Their Lordships of the Privy Council were again dealing with Cl. 39 of the Bombay High Court Letters Patent and laid down that no appeal lay from a case stated by an income-tax authority for the opinion of the High Court. The gist of the judgment as I read it is that such a decision by the High Court is only advisory and cannot be said to decide anything final. The real question before their Lordships was whether such a decision could be considered a final judgment. It is true that the words 'judgment' and 'final judgment' appear to be used interchangeably in the course of the discussion in the judgment of their Lordships of the Privy Council but I am quite unable to see that any such inference can be drawn from it as has been drawn in the Rangoon case with all respect to their Lordships of the Rangoon High Court. The next case decided by their Lordships of the Privy Council is 48 Cal. 481³² at p. 484. Here again the point before their Lordships of the Privy Council was whether O. 41, R. 10, Civil P. C., applied to Letters Patent appeals. There is just one word in the course of this judgment at p. 487 from which inferences have been drawn by their Lord-

ships of the Rangoon High Court. The sentence runs as follows :

"Section 15, Letters Patent, is such a law and what it expressly provides, namely an appeal to the High Court's appellate jurisdiction from a decree of the High Court in its ordinary original jurisdiction is thereby saved."

It is contended that as their Lordships of the Privy Council have used the word 'decree' instead of the word 'judgment,' therefore, the word 'judgment' and the word 'decree' are synonymous in the opinion of their Lordships of the Privy Council. I do not consider that any such inference can be drawn. As rightly pointed out in 43 C.W.N. 697¹¹ at p. 724, it is difficult to understand what would be the bearing of this remark when their Lordships were considering whether S. 104 governed the Letters Patent appeal clause or not. Section 104 obviously applies only to appeals from orders and not to appeals from decrees. If, therefore, the Letters Patent appeal clause only applied to decrees the short answer would be that S. 104 could have no bearing on the question at all and there would be no need to discuss the operation of the saving clause of S. 104 whereby appeals provided by any other law were saved. It seems to me that this argument is conclusive on the subject and 48 Cal. 481³² cannot by the use of the word 'decree' in place of the word 'judgment' be held to have overruled the previous decisions of the Indian High Courts or indeed ever have intended to give any interpretation of Cl. 10 of the Punjab Letters Patent, whereby the word "judgment" should be made synonymous with the word "decree."

I have now dealt with all the rulings referred to before us in the course of the arguments in the different High Courts and in the Privy Council and in the Federal Court. There remains only to notice two rulings of our own High Court : 8 Lah. 681³⁶ is a decision by Sir Shadi Lal and Broadway J.J. In that case an order transferring a suit and an order refusing to transfer a suit were distinguished and it was held that an order refusing to transfer a suit was not a judgment within the meaning of Cl. 10, Letters Patent. With the greatest respect to the learned Judges who decided that case, I am unable to follow the reasoning in the case. The proceeding which terminated by the refusal to transfer the suit could never have taken place in the trial Court trying the suit at all. An application to have the suit transferred could only be made to the High Court and the proceeding so far as the right to have the suit transferred was concerned was entirely terminated by the order refusing the transfer. If then the reasoning of 35 Mad. 1⁹ was to be applied to the case the order was a judgment within the meaning of the clause and therefore appealable. This judgment does not differ from the previous view expressed in 3 Lah. 188.² On the contrary it applies the test laid down in 35 Mad. 1.⁹ But with great respect it seems to consider that as the suit still continued therefore no right or liability had been determined in that suit and, therefore, that no appeal lay. If this decision were correct then an order refusing to stay execution would also not be a judgment for the execution proceedings would continue in the original Court as a result of the refusal. Yet the same learned Judge, namely Sir Shadi Lal who delivered the judgment in 8 Lah. 681³⁶ had held that an order refusing stay of execution was a judgment within the meaning of Cl. 10. I am unable to see that if the test proposed

35. ('38) 20 A.I.R. 1933 All. 262 : 142 I. C. 331 : 55 All. 326 : 1933 A.L.J. 127 (F.B.), Sital Din v. Anant Ram.

36. ('27) 14 A.I.R. 1927 Lah. 540 : 102 I.C. 843 : 8 Lah. 681 : 29 P.L.R. 70, Pablad Rai v. Shiv Ram.

in 35 Mad. 1^o and approved in 3 Lah. 188² is correct, how this decision can be said to have been correct.

In 17 Lah. 606⁶ a Division Bench (Addison and Abdul Rashid JJ.) held that an order registering a decree as that of a revenue Court is not a judgment. With great respect to the learned Judges I am again unable to see how their Lordships came to the conclusion on which they based their decision that nothing had been decided by this order. Section 100, Punjab Tenancy Act, lays down that before any such thing can be done the High Court has to be satisfied (1) that the proceedings were bona fide, (2) that no prejudice has been caused to any party and (3) that there has been a mistake of jurisdiction and then and only then can the High Court register a decree of the subordinate Court as a decree of the revenue Court of a corresponding rank. It is obvious, therefore, that when a decree of a civil Court is registered by order under S. 100, Punjab Tenancy Act, as a decree of the revenue Court three things have been decided and it is impossible to say that by this order nothing has been decided and that the order is only an administrative order. With great respect, therefore, to their Lordships who decided that case, I am of opinion that that case was wrongly decided.

I may now briefly summarise my conclusions which are as follows : I do not consider that their Lordships of the Privy Council have overruled the series of decisions both in the Calcutta High Court and in the Madras High Court which though they have propounded a different test certainly have not laid down that the word 'judgment' is synonymous with 'decree.' I do not think their Lordships of the Privy Council either intended to lay down any such principle of interpretation nor would their Lordships have done so without noticing the controversy and expressly overruling the cases which had decided to the contrary. I, therefore, do not see that the views propounded in the Allahabad and Rangoon Full Benches which have been discussed above are correct, with all respect to the learned Judges who decided those cases. I do not consider that it is necessary in the present Full Bench to decide finally whether the view of the Calcutta High Court as expressed in 17 W.R. 364⁸ is correct or whether the test given in 35 Mad. 1^o is correct. Under both the tests the present case is one in which the order would be a judgment and therefore appealable. It is really unnecessary to say any more except that I would agree entirely with the remarks in 3 Lah. 188² that the best test propounded so far is the test laid down in 35 Mad. 1^o. It is not, however, necessary to decide whether that test is comprehensive so as to exclude all other tests. It is sufficient to say that each case must be considered on its own facts and circumstances and while the tests propounded in Madras and in the Calcutta High Courts serve as a good guide for this Court it is not necessary to hold that those tests are comprehensive and exclude other cases. I would, therefore, answer the reference to the Full Bench by holding that the order in the present case is a judgment and therefore appealable under Cl. 10, Letters Patent. The case will now go back to the Division Bench for disposal on merits.

DIN MOHAMMAD J. — I agree.

BLACKER J. — I agree.

GEN./R.K.

Answer accordingly.

C. P. C. —

(a) ('40) Chitaley, Letters Patent (Cal.) Cl. 15, N. 2 Pt. 17.

(41) Mulla, Letters Patent (Cal.) P. 1403 Pts. (x) and (y).

(b) ('40) Chitaley, Letters Patent (Cal.) Cl. 15, N. 2.

(41) Mulla, Letters Patent (Cal.) Cl. 15 P. 1401 Note, 'Meaning of judgment as used in this clause.'

(c) ('40) Chitaley, Letters Patent (Cal.) Cl. 15, N. 3 Pt. 35.

(41) Mulla, Letters Patent (Cal.) Cl. 15 P. 1404 Pt. (d).

(d) ('40) Chitaley, Letters Patent (Cal.) Cl. 15, N. 3 Pt. 39.

(41) Mulla, Letters Patent (Cal.) Cl. 15 P. 1403 Note, 'Interlocutory order.'

(e) ('40) Chitaley, S. 104, N. 2 Pt. 2.

A. I. R. (29) 1942 Lahore 100

BHIDE J.

Gulla and others — Convicts — Petitioners
v.

Emperor.

Criminal Revn. Petn. No. 1684 of 1941, Decided on 24th November 1941, for revision of order of Sess. Judge, Jhelum, D/- 26th August 1941.

Criminal P. C. (1898), Ss. 366, 367 and 537 — Procedure under Ss. 366 and 367 must be carefully observed — Passing of sentence without recording judgment is illegal — Sentence announced orally and judgment dictated subsequently — Before signing judgment, Magistrate murdered — Judgment in conformity with sentence — In appeal accused objecting to lower Court's procedure but subsequently waiving objection — Conviction upheld — Waiver held amounted to admission that accused was not prejudiced — Defect in Magistrate's procedure held was cured by S. 537.

The requirements of Ss. 366 and 367 are no mere matters of form. It is therefore very important that the procedure laid down in Ss. 366 and 367 should be carefully observed by Courts. The Court must record a proper judgment and date and sign it at the time of pronouncing it and passing the sentence. It is consequently illegal for a Court to pass a sentence without recording a judgment : 14 All. 242 (F.B.); 27 Mad. 237 and ('80) 17 A. I. R. 1930 Pat. 148, *Rel. on.* [P 101 C 1]

The sentence was announced orally on 27th June 1941 but the judgment which was in conformity with the sentence was not dictated till 6th July 1941. Before the judgment was, however, signed by the Magistrate, he was murdered and, therefore, the shorthand notes of the judgment along with a typed judgment were placed on the record by the order of his successor. An appeal was presented to the Sessions Judge and an objection was raised first that the conviction of the accused was vitiated by the fact that the sentence was pronounced at a time when the judgment had not been actually recorded. The objection was however subsequently waived and the conviction of the accused was upheld :

Held that the defect in the Magistrate's procedure was cured by S. 537. The fact that the accused himself deliberately waived his objection to the procedure of the Magistrate was tantamount to an admission that there had been no prejudice to him: ('25) 12 A. I. R. 1925 Lah. 137; 23 Cal. 502; ('22) 9 A. I. R. 1922 Mad. 502 (F. B.) and ('30) 17 A. I. R. 1930 Rang. 77, *Rel. on.*; 14 All. 242 (F.B.), *Disting.* [P 101 C 2]

Nasir Ahmad Mahmood — for Petitioners.

ORDER. — The petitioners Gulla, Bir Bal and Lall were convicted in this case by the Sub-divisional Magistrate of Chakwal (the late Mr. K.C. Chowdhry) under S. 325 read with S. 34, Penal Code, and sentenced to nine months' rigorous imprisonment each and their security bonds also were forfeited. The sentence was apparently announced orally on 27th June 1941 but the judgment was not dictated till 6th July 1941. Before the judgment was, however, signed by the Magistrate, he was murdered and therefore the shorthand notes of the judgment along with a typed judgment were placed on the record by the order of his successor. An appeal was presented to the learned Sessions Judge and an objection was raised first that the conviction of the petitioners was vitiated by the fact that the sentence was pronounced at a time when the judgment had not been actually recorded. The objection was, however, subsequently waived and the conviction of the present petitioners was upheld although a co-accused named Habib was acquitted. On behalf of the petitioners, the contention has once more been raised that the conviction was bad as the sentence was pronounced before recording a judgment as required by the provisions of Ss. 366 and 367, Criminal P. C. In support of this contention reliance was placed on a Full Bench ruling of the Allahabad High Court reported in 14 All. 242¹ which was followed by the Madras High Court in 27 Mad. 237² and by the Patna High Court in 8 Pat. 904.³ There can be no doubt that Ss. 366 and 367, Criminal P. C., require that in the case of an original trial by a criminal Court (and the same provisions have been made applicable to judgments in appeals except in the case of the High Court by S. 424, Criminal P. C.), the Court must record a proper judgment and date and sign it at the time of pronouncing it and passing the sentence. It is consequently illegal for a Court to pass a sentence without recording a judgment. The learned Judges of the Allahabad High Court observed in 14 All. 242¹ as follows :

"The requirements of Ss. 366 and 367 are no mere matters of form. The provisions of those sections are based upon good and substantial grounds of public policy, and whether they are or not, Sessions Judges must obey them and not be a law to themselves.

Any Judge at the conclusion of the evidence in a case, some of which may be not quite distinct in his mind owing to the length of the trial, might pass sentence on a prisoner and find it impossible honestly afterwards to put on paper good reasons for having convicted him, or, on the other hand, might direct that the accused be set at liberty and find it impossible afterwards honestly to put on paper good reasons for the acquittal. The law wisely requires that the reasons for the decision shall accompany the decision, and shall not be left to be subsequently inserted or recorded."

It is therefore very important that the procedure laid down in Ss. 366 and 367, Criminal P. C., should be carefully observed by the Courts. However, the circumstances of this case are peculiar. The Magistrate, who pronounced the sentence, was murdered shortly afterwards. He did, however, dictate a judgment before the murder which was in conformity with the sentence which had been pronounced.

1. ('92) 14 All. 242: 1892 A.W.N. 83 (F.B.), Queen-Empress v. Hargobind Singh.
2. ('04) 27 Mad. 237 : 2 Weir 440, Bandanu Achayya v. Emperor.
3. ('30) 17 A.I.R. 1930 Pat. 148 : 122 I.C. 531 : 31 Cr. L. J. 416 : 8 Pat. 904 : 11 P. L. T. 195, Jhari Lal v. Emperor.

Lastly, the petitioners themselves waived their objection in this respect before the learned Sessions Judge at the hearing of their appeal. Section 537, Criminal P. C., lays down, inter alia, that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision by reason of any error, omission or irregularity in the judgment or other proceedings before or during trial unless such error, omission or irregularity has occasioned a failure of justice. In A.I.R. 1925 Lah. 137,⁴ S. 537 was held to apply to a case of the present type and a similar view appears to have been taken in 23 Cal. 502,⁵ 45 Mad. 913⁶ and 7 Rang. 370.⁷ In the present instance, the fact that the accused themselves deliberately waived their objection to the procedure of the learned Magistrate may be taken to be tantamount to an admission that there had been no prejudice to them. One of the courses open to the appellate Court if the objection had been pressed was to order a retrial but the petitioners evidently did not want a retrial and no request for retrial was made before me also. I, therefore, overrule this objection.

On merits, there is not much force in the petition except in the case of petitioner Lall. The learned Sessions Judge acquitted one of the accused named Habib on the ground that Rehmdil a prosecution witness had a case against him which had been dismissed. It was urged that Lall petitioner also should have been acquitted on similar grounds. It is pointed out that Saudagar complainant had admitted that he had been beaten by Lall some time before the occurrence and that the complaint instituted by Saudagar against Lall had been dismissed. In my opinion, the guilt of Lall also is open to doubt in view of the previous enmity. According to the defence version only Gulla petitioner had taken part in the fight but it is difficult to believe this version as Saudagar complainant had 14 injuries on his person while Gulla had none. It seems, therefore, very probable that Gulla was assisted by his uncle Bir Bal as alleged by the prosecution. I am of opinion that the guilt of Bir Bal and Gulla has been established beyond all reasonable doubt. The medical evidence shows that the beating given to Saudagar was very severe and in the circumstances the sentence of nine months' rigorous imprisonment passed upon each of Gulla and Bir Bal cannot be considered to be excessive. These two petitioners were on security under S. 107, Criminal P. C., and their bonds have also been forfeited. The amount forfeited was Rs. 500. This seems to be somewhat excessive in view of the substantial sentence of imprisonment. I accordingly accept the petition of Gulla and Bir Bal only to the extent of reducing the amount of the bond forfeited to Rs. 200 in each case. The petition of Lall is accepted, his conviction is set aside and he is acquitted.

G.N./R.K.

Order accordingly.

4. ('25) 12 A.I.R. 1925 Lah. 137 : 81 I. C. 193 : 25 Cr. L. J. 705, Ata Muhammad v. Emperor.
5. ('96) 23 Cal. 502, Tilak Chandra v. Baisagomoff.
6. ('22) 9 A.I.R. 1922 Mad. 502 : 68 I. C. 615 : 23 Cr. L. J. 583 : 45 Mad. 913 : 43 M. L. J. 369 (F.B.), Sankaralinga Mudaliar v. Narayana Mudaliar.
7. ('30) 17 A.I.R. 1930 Rang. 77 : 120 I. C. 225 : 30 Cr. L. J. 1166 : 7 Rang. 370, Mohamed Hayat Mulla v. Emperor.

Cr. P. C. —

('41) Chitale, S. 366, N. 1 Pt. 1 and N. 11 S. 537 N. 12 Pts. 3 to 5.

('41) Mitra, S. 366 P. 1203, P. 1210 N. 1045.

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FULL BENCH

TEK CHAND, MONROE AND
DIN MOHAMMAD JJ.

Sham Singh and others —
Judgment-debtors — Appellants
v.

Vir Bhan and others — Decree-holders
— Respondents.

Exn. First Appeal No. 34 of 1941, Decided on 12th January 1942; case referred by Tek Chand and Din Mohammad JJ., D/- 12th May 1941, from order of Sub-Judge, First Class, Amritsar, D/- 6th January 1941.

(a) Civil P. C. (1908, as amended by Punjab Act 12 of 1940), S. 60 (1) (ccc) — S. 60 (1) (ccc) is not retrospective — It does not apply to attachment or sale effected before it came into force—Fact that sale was not confirmed is immaterial—Word “sale” in S. 60 (1) (ccc) means sale as at conclusion of auction and not as confirmed by Court.

There is nothing in the Act which expressly or by necessary implication, gives retrospective effect to its provisions so as to make them applicable to cases in which the attachment or sale had been effected before its enactment. Therefore S. 60 (1) (ccc) does not apply to attachment or sale effected before the amending Act came into force. The fact that the sale was not confirmed when the amending Act came into force is immaterial inasmuch as the word ‘sale’ in S. 60 (1) (ccc) has the same meaning as in other provisions relating to execution sales in the Civil Procedure Code, namely a sale as at the conclusion of the auction and not as confirmed by the Court. [P 103 C 1, 2]

Moreover, the auction purchaser has substantial rights in the property during the interval between the auction sale and the confirmation thereof and these rights cannot be taken away by supervening legislation, unless the Legislature has clearly expressed itself that it shall be so. The Punjab Act, 12 of 1940, which amended S. 60, Civil P. C., does not contain any such provision and therefore a judgment-debtor other than an agriculturist cannot claim exemption under S. 60 (1) (ccc) when the sale had been effected before the date on which the Punjab Amending Act, 12 of 1940 came into force, though the sale had not been confirmed on that date: (‘36) 23 A.I.R. 1936 Lah. 191 and (‘39) 26 A. I. R. 1939 Lah. 9, *Approved*; (‘41) 28 A. I. R. 1941 F. C. 5, *Expl.* [P 104 C 1; P 105 C 1]

(b) Limitation Act (1908), Art. 166 — Word ‘sale’ in Art. 166 has same meaning as in Civil Procedure Code, namely sale as at conclusion of auction.

The word “sale” in Art. 166 is used in the same sense as in the Civil Procedure Code, namely a sale as at the conclusion of the auction and not as confirmed by Court. [P 103 C 2]

(c) Interpretation of Statutes — Statutes in *pari materia* though made at different times—They ought to be uniformly construed.

Where there are different statutes in *pari materia*, though made at different times, they ought to receive a uniform construction: (1865) 11 H. L. C. 443, *Rel. on.* [P 108 C 2]

(d) Civil P. C., (1908), S. 65 and O. 21, R. 92 — In interval between sale and confirmation

auction purchaser acquires substantial interest — Consequences flowing from acquisition of such interest stated.

No doubt it is only when an order confirming the sale is passed that the sale becomes absolute, but as laid down in S. 65 when a sale has become absolute the property is deemed to have vested in the purchaser from the time when the property was sold and not the time when the sale became absolute. In the interval between the sale and confirmation, the auction purchaser acquires substantial interest in the property: (‘31) 18 A. I. R. 1931 P. C. 33, *Rel. on.* [P 103 C 2; P 104 C 1]

If there be any accretions to the property between the date of the sale and the date of confirmation, those accretions become the property of the purchaser; and conversely, obligations which arose during the same period would also be transferred to him and not fall on the judgment-debtor: 40 Cal. 89 (P.C.), *Rel. on.* [P 104 C 1]

On the same principle the auction purchaser is entitled to the mesne profits which have accrued due in the interval: (‘40) 27 A.I.R. 1940 Lah. 230, *Rel. on.* [P 104 C 1]

Nor can the rights of the auction purchaser be defeated by a transfer made by the judgment-debtor during this period: 8 I. C. 657 (Cal.), *Rel. on.* [P 104 C 1]

(e) Interpretation of Statutes — Statute when retrospective — Amending Act whether applies to pending actions.

A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only: (1898) 2 Q. B. 547, *Rel. on.* [P 104 C 1]

The same rule governs the applicability of an amending statute to a pending action and provisions which touch a right in existence at the passing of the statute should not be applied retrospectively in the absence of express enactment or necessary intendment: (‘27) 14 A. I. R. 1927 P. C. 242, *Rel. on.* [P 104 C 1]

S. L. Puri and N. L. Salooja — for Appellants—
C. L. Aggarwal and Yashpal Gandhi for A. C. Mehta — for Respondents.

TEK CHAND J.—The material facts of the case, which has given rise to this reference to the Full Bench are as follows: On 1st June 1936, respondents 1 and 2 obtained a money decree against the appellants. In execution of this decree, certain premises situate in the town of Tarn Taran, District Amritsar, were attached and ordered to be sold. The auction sale was held on 27th August 1940 when the highest bid of Dina Nath (respondent 3) was accepted. The auction purchaser deposited one-fourth of the purchase price forthwith. He paid the remaining three-fourth on 1st October 1940.

In the meantime, on 30th August 1940, the judgment-debtors had raised objections under O. 21, R. 90, Civil P. C., alleging material irregularities in publishing and conducting the sale. While these objections were being inquired into, Punjab Act 12 of 1940 came into force on 5th October 1940. By S. 35 of that Act a new cl. (ccc) was added to sub-s. (1) of S. 60, Civil P. C., which provided that the “main residential house and other buildings attached

to it . . . belonging to a judgment-debtor other than an agriculturist and occupied by him," shall not be liable to attachment and sale in execution of a money decree. On 22nd October 1940, the judgment-debtors filed further objections, purporting to be under S. 47, Civil P. C., and stating that the attached property was their "main residential house" and, therefore, it could not be sold in execution of the decree under S. 60, Civil P. C., as amended. The decree-holder denied that the attached property was a "house" and contended that it was a "shop," as described in the execution application and the sale proclamation. He further urged that even if the property was the "main residential house" of the judgment-debtors, the amending Act did not apply as the sale had been held and the sale price paid before the Act came into force and that it was immaterial that the sale had not been confirmed on that date.

The Subordinate Judge, without determining the question of fact as to whether the property in question was a "shop" or the "main residential house" of the judgment-debtors, held that the new Act was inapplicable as the auction sale had been held before the Act came into force, even though the sale had not been confirmed on that date. He also held that the objections under S. 47 were barred under Art. 166, Limitation Act, having been made more than thirty days after the date of the sale. He further found that the judgment-debtors had failed to establish the alleged irregularities. On these findings he dismissed the objections and passed an order confirming the sale. From this order the judgment-debtors have preferred a first appeal to this Court which came up for hearing before a Division Bench. The Bench, after examining the evidence, affirmed the finding of the Court below that no irregularities in publishing or conducting the sale had been proved. The two remaining questions were questions of law, on one of which there was no direct authority and on the second there was a divergence of judicial opinion in the various High Courts and, therefore, they have been referred to the Full Bench. These questions are :

(1) Whether the exemption from attachment or sale of the "main residential house" of a non-agriculturist judgment-debtor, allowed under S. 60 (1) (ccc) can be claimed by the judgment-debtor when the auction sale had been held before the date on which the amending Act (12 of 1940) came into force, but it had not been confirmed on that date, and

(2) If so, can an objection to this effect be raised under S. 47, Civil P. C., more than thirty days after the date of the sale ?

We have heard counsel at length and have no doubt that the first question must be answered in the negative; assuming that the property is the "main residential house" of the judgment-debtors, the exemption allowed by the amending Act cannot be claimed by them. In the proviso to sub-s. (1) of S. 60, Civil P. C., it is declared that the "following particulars shall not be liable to attachment or sale." By the amending Act, "the main residential house of a non-agriculturist judgment-debtor" was added to the list of these particulars. It will be seen that the exemption is from 'attachment or sale,' and, in this case, the attachment as well as the sale had both taken place before the Act came into force. There is nothing in the Act which, expressly or by necessary implication, gives retrospective effect to its provisions so as to make them applicable to cases in which the attachment or sale had been effected before its enactment. This is not seriously denied, but it is urged that, in the present case, though the

auction had been held in August 1940 and the bid of the auction-purchaser accepted and the price paid, the order of confirmation had not been passed on 5th October 1940, when the Act came into force and, therefore, there had really been no "sale." It is contended that in cl. (ccc) 'sale' should be taken to mean an execution sale, which had been confirmed by the executing Court and not a sale which though otherwise complete, was liable to be set aside for any of the reasons specified in O. 21, R. 92, Civil P. C. This contention is, in my opinion, without force. There is nothing in S. 60, or the added cl. (ccc), or any other part of the Code, which might warrant this interpretation. On the other hand, in all the provisions of the Code, relating to execution sales of immovable property, the word 'sale' is used as meaning sale as at the conclusion of the auction, and not as confirmed by the Court. In O. 21, R. 84, Civil P. C., it is stated :

"On every sale of immovable property the person declared to be the purchaser shall pay immediately, after such declaration, a deposit of 25 per cent. . . and in default of such deposit, the property shall forthwith be re-sold."

In R. 85 provision is made for payment of the remaining three-fourth "on the fifteenth day from the sale of the property." Rule 86 lays down the procedure in default of payment of the purchase price and here also the word "sale" is used in the same sense. Again, in Rr. 89, 90 and 91, the auctioned property is described as 'sold in execution of a decree' and permits various persons to apply after auction but before confirmation, to have the 'sale set aside' on certain specified conditions. Lastly, R. 92 provides, that if any of these conditions is satisfied, the 'sale shall be set aside', but if none of them is found to exist, 'the Court shall pass an order confirming the sale'. This being the sense in which the word 'sale' is used in the Code, there seems no reason why it should be assumed that the Legislature intended to give it an altogether different meaning in cl. (ccc). It may also be mentioned that in Art. 166, Limitation Act, the period prescribed for an application to "set aside a sale in execution of a decree" is thirty days from "the date of the sale." In this article also, 'sale' is used in the same sense as in the Civil Procedure Code. It is true that cl. (ccc) was added by the Punjab Legislature to the Civil Procedure Code, which is an Act of the Central Legislature, but this ought not to make any difference. It is a settled rule of interpretation that where there are different statutes in *pari materia*, though made at different times, they ought to receive a uniform construction: (1865) 11 H.L.C. 443¹ at p. 480.

It was next argued that until an order is passed confirming the sale, the judgment-debtor is the owner of the property; it is only on confirmation that title passes to the auction-purchaser. It is, therefore, argued that as in this case the sale had not been confirmed on the date when the Act came into force, the auction-purchaser had not acquired any real interest in the property and the judgment-debtors are entitled to claim the exemption, allowed by the Act. It is no doubt true that it is only when an order confirming the sale is passed that the sale becomes absolute, but as laid down in S. 65 when a sale has become absolute the property is deemed to have vested in the purchaser from the time when the property was sold and not the time when the sale became absolute. In the interval between the

1. (1865) 11 H. L. C. 443 : 20 C. B. (N. S.) 56 : 35 L. J. M. C. 1 : 11 Jur. (N.S.) 746 : 13 W. R. 1069, *Mersey Docks v. Cameron*.

sale and confirmation, the auction-purchaser had acquired substantial interest in the property and this interest cannot be disregarded": A.I.R. 1931 P. C. 33.² As observed by their Lordships of the Privy Council in 40 Cal. 89³ at p. 102, "the sale is no doubt confirmed on a subsequent date, but it is the date of the auction which is the true and actual date of the sale and it is the sale held on that date, which is confirmed."

It was, accordingly, held in the case cited that if there be any accretions to the property between the date of the sale and the date of confirmation, those accretions become the property of the purchaser; and conversely, obligations which arose during the same period would also be transferred to him and not fall on the judgment-debtor. Following this principle, it has been held that the auction purchaser is entitled to the mesne profits which have accrued due in the interval: A.I.R. 1940 Lah. 280.⁴ Nor can the rights of the auction purchaser be defeated by a transfer made by the judgment-debtor during this period: 8 I.C. 657.⁵ The auction purchaser thus has substantial rights in the property and these rights cannot be taken away by supervening legislation, unless the Legislature has clearly expressed itself that it shall be so. In the classical words of Wright J., in the well-known case in (1898) 2 Q. B. 547⁶ at p. 552:

"Nothing is more firmly established than this that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only."

That the same rule governs the applicability of an amending statute to a pending action was recently emphasised by their Lordships of the Privy Council in 9 Lah. 284⁷ at p. 290 in the following words:

"While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be technically inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intentment."

This rule has been applied by this Court in the interpreting cognate enactments in this province. In A.I.R. 1936 Lah. 191⁸ agricultural land belonging to a judgment-debtor had been attached and sold. After the date of sale, but before confirmation, the judgment-debtor was declared a member of an agri-

cultural tribe, whose land could not be sold in execution of a decree under S. 16, Punjab Alienation of Land Act. The judgment-debtor objected to confirmation of the sale on the ground that in view of the declaration his land was exempt from sale but the objection was overruled, it being held that the Act was not retrospective and as laid down by the Privy Council once a sale had taken place the Court had no jurisdiction to refuse to confirm it unless objections specified in O. 21, Rr. 89 and 91 had been taken and sustained. Similarly, in A.I.R. 1939 Lah. 9,⁹ the land of an agriculturist judgment-debtor had been attached and temporary alienation ordered. The executing Court determined the period for which the alienation was to be effected. While objections by the judgment-debtor were under consideration, the Punjab Debtors' Protection Act (2 of 1936) came into force and the judgment-debtor claimed that in view of its provisions the order for temporary alienation could not be given effect to. The contention was overruled, it being held that the new Act was inapplicable, as before its enactment the decree-holder had acquired substantial rights which could not be affected by a change in the law, without any provision to this effect in the amending Act. It was pointed out that the auction-sale of the "lease" had been held, and the only thing that remained to be done was to consider the objections of the judgment-debtor as to the publication and conduct of the sale. If these objections were dismissed, the "lease" would have effect from the date of the sale which was anterior to the commencement of the Act. The learned counsel for the appellants contended that a different rule must be applied to a case like the present, in view of the recent pronouncement of the Federal Court in A.I.R. 1941 F.C. 510:

"That a Court, in the exercise of its appellate jurisdiction has power not only to correct errors in a judgment under review but to make such disposition of the case as justice requires and in determining what justice does require the Court is bound to consider any change either in fact or in law, which has supervened since the judgment was entered."

These remarks were made with reference to the provisions of the Bihar Money-lenders (Regulation of Transactions) Act, 1939, Sec. 7 of which enacted that:

"Notwithstanding anything to the contrary contained in any other law, or in anything having the force of law, or in any agreement, no Court shall, in any suit brought by a money-lender, before or after the commencement of this Act, in respect of a loan, advanced before or after the commencement, of this Act, or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced by such document."

This section had made it obligatory on a Court of appeal or revision to allow only such interest as was permissible under the new Act, regardless of what the law was at the time when the contract was entered into, the suit instituted, or the decree of the Court below passed, and it was in reference to it that their Lordships of the Federal Court made

9. ('39) 26 A. I. R. 1939 Lah. 9 : 181 I.C. 385 : 40 P.L.R. 976, Dasu Ram v. Ghazi Mohammad.

10. ('41) 28 A. I. R. 1941 F. C. 5 : 191 I. C. 659 : I.L.R. (1941) Kar. F. C. 1 : 1940 F. C. R. 84 : 20 Pat. 429, Lachmeshwar Prasad v. Keshwar Lal.

2. ('31) 18 A.I.R. 1931 P. C. 33 : 130 I. C. 686 : 27 N. L. R. 95 : 58 I. A. 50 (P. C.), Nanhe Lal v. Umrao Singh.

3. ('13) 40 Cal. 89 : 16 I. C. 210 : 39 I. A. 228 (P. C.), Bhawani Kuwar v. Mathura Prasad Singh.

4. ('40) 27 A. I. R. 1940 Lah. 280 : 190 I. C. 635, Abdul Ghani v. Lal Chand.

5. ('10) 8 I. C. 657 : 15 C. W. N. 312, Ram Saran Singh v. Khakhan Singh.

6. (1898) 2 Q.B. 547 : 67 L. J. Q. B. 955 : 79 L.T. 803 : 47 W. R. 144 : 5 Manson 322, In re Athlumney; Ex Parte Wilson.

7. ('27) 14 A.I.R. 1927 P. C. 242 : 107 I. C. 156 : 9 Lah. 284 : 54 I. A. 421 (P. C.), Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commissioner, Delhi.

8. ('36) 23 A. I. R. 1936 Lah. 191 : 161 I. C. 752, Abdul Rahim v. Abdul Haq.

these remarks. Admittedly, Punjab Act 12 of 1940, which amended S. 60, Civil P. C., does not contain any such provision. For the foregoing reasons I would answer the first question in the negative and would hold that a judgment-debtor other than an agriculturist cannot claim exemption under S. 60 (1) (ccc) when the sale had been effected before the date on which the Amending Act 12 of 1940 came into force, though the sale had not been confirmed on that date. In view of this decision, the second question does not arise, and it is not necessary to answer it. I would, accordingly, affirm the order of the executing Court and dismiss the appeal with costs.

MONROE J. — I agree.

DIN MOHAMMAD J. — I agree.

G.N./R.K. *Appeal dismissed.*

Limitation Act —

(b) ('42) Chitaley, Art. 166, N. 21 Pt. 1.

(38) Rustonji, Art. 166 P. 1601 Pt. 3.

C. P. C. —

(c) ('40) Chitaley, Pre. N. 7 Pt. 12.]

(d) ('40) Chitaley, S. 65, N. 8 Pts. 1 and 3; N. 10 Pt. 1.

(41) Mulla, S. 65 P. 264 Pts. (b) and (c); P. 266 Pt. (k).

(e) ('40) Chitaley, Pre. N. 3 Pts. 1 and 2.

(41) Mulla, P. 3 Pt. (w).

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FULL BENCH

YOUNG C. J., MONROE AND
MUHAMMAD MUNIR JJ.

*In re K. L. Gauba, Barrister-at-Law,
Lahore.*

Criminal Original No. 2 of 1942, Decided on 18th February 1942.

(a) Lahore High Court Rules and Orders, Vol. 5, Chap. 3-B, R. 1 — Chief Justice has power to appoint Bench or Full Bench to hear and dispose any case (summary proceedings for contempt).

Both under S. 108 (2), Government of India Act, 1915, the powers whereunder are preserved by S. 223 of Act of 1935 and the Rules of the Lahore High Court the Chief Justice has the power to appoint a Bench or Full Bench for the hearing and disposal of any particular case, even summary proceedings for contempt. [P 106 C 2]

(b) Government of India Act (1915), S. 108 (1) — 'Original' — Meaning explained — Chief Justice has power to nominate Special Benches for disposal of contempt cases.

The word "original" in sub-s. (1) of S. 108 is used in contradistinction to the word "appellate" and therefore proceedings which are started by the Court itself can properly be described as original, and the Chief Justice has power to nominate Special Benches for the disposal of contempt cases: ('18) 5 A.I.R. 1918 Cal. 988 (S.B.) and ('29) 16 A.I.R. 1929 Pat. 72 (F.B.), *Rel. on.* [P 106 C 2]

(c) Contempt of Courts Act (1926), S. 2 — Lahore High Court has jurisdiction to proceed summarily and punish even contempt of its own authority.

The High Court of Lahore is a Court of Record and therefore possesses the ordinary jurisdiction of a Court of Record to punish contempt of itself by

summary procedure and it is not possible for a Judge to pursue a remedy for libel or slander in a Civil or Criminal Court: *Case law referred.*

[P 107 C 1, 2]

(d) Criminal P. C. (1898), Ss. 1 and 344 — Criminal Procedure Code not applicable to summary proceedings for contempt — Such proceedings held not to be stayed merely because accused has applied under S. 220 (2) (b), Government of India Act.

The Criminal Procedure Code is not applicable to summary proceedings taken for punishing a contempt. Even if S. 344 of the Code be applicable in a case where the Court is scandalised and an attempt is made by a scurrilous publication to undermine and impair the authority of the Court, immediate action is necessary with a view to vindicate the authority of the Court and the proceedings should not be adjourned merely because an application has been made by the accused to His Majesty through the Viceroy under S. 220 (2) (b), Government of India Act. [P 107 C 2]

* (e) Criminal P. C. (1898), S. 556 — Applicability — Summary proceedings for contempt — Judge against whom contempt has been made should sit — Reason for such course stated.

Section 556 does not apply to summary proceedings taken for punishing contempt as the provisions of Criminal Procedure Code are not applicable. Proceedings for punishing contempt are taken not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but with a view to protect the public and specially those who either voluntarily or by compulsion, are subject to the jurisdiction of the Court, from the mischief they will incur if the authority of the tribunal be undermined or impaired. The gravamen is an endeavour to shake the confidence of the public in the Court. While it is unpleasant for any Judge to have to sit in judgment in a case in which he has been personally attacked, it is his duty to do so where he has been the subject of a malicious and impudent publication containing imputations which are obviously false and of the falsity of which he himself has the best knowledge. In such cases he has no alternative but to sit as it is impossible to vindicate the reputation of the Court which has been attacked by taking proceedings in any Court for libel or otherwise: *Case law referred.* [P 107 C 2; P 108 C 1]

* (f) Contempt — Person scandalising Judges of Court — It is not open to him to show that allegations are true — Attempt to justify libel is fresh contempt.

Where a person has scandalised the Court or the Judges by broadcasting a publication imputing injustice, dishonesty, corruption or improper motives to them in their judicial capacity it is not open to him to lead evidence to show that the allegations are true and any attempt to justify a libel on a Judge by attempting to show that the libel was justified would itself be a fresh contempt: ('35) 22 A.I.R. 1935 Cal. 419 (F.B.); (1894) 1 Ch. 347 and ('35) 22 A.I.R. 1935 All. 38, *Rel. on.* [P 108 C 1]

(g) Contempt — Scandalous allegations* of improper and corrupt motives against Judges amount to contempt of Court.

A book which contains most scandalous allegations of improper and even corrupt motives against Judges of the High Court is deliberately calculated to interfere with and bring into contempt the

a administration of justice in the Province and to lower the prestige of that Court. [P 108 C 2]

(h) Contempt—Intimidating Judges by attack and abuse is gross contempt of Court.

The technique employed by the accused in his book was to attack and abuse all judicial officers, who, in accordance with their duty, had to decide cases in which he was interested and thus hoped to intimidate any Judge who may have to decide cases in which he was involved :

Held that this by itself was a gross contempt of Court. [P 109 C 1]

(i) Contempt—Posting of cases before Benches — Practice of — Reasonable criticism thereon should be allowed — But criticism neither reasonable nor bona fide and with allegation of improper motive is contempt of Court.

b It obviously might be said that reasonable criticisms about the administration of the Chief Justice in posting cases before Benches, Single, Division etc., should be allowed; but where the criticisms are not reasonable or bona fide and there is underlying all of them a suggestion or allegation of improper motives it amounts to contempt of Court.

[P 113 C 1]

M. Sleem, Advocate-General — for the Crown.

K. L. Gauba in person.

c YOUNG C. J. — Notice was issued to K. L. Gauba, an Advocate of this Court, to show cause why he should not be committed to jail for scandalising the Chief Justice and another Judge of this Court by publishing a book called "The New Magna Charta." The notice was made returnable to a Special Bench consisting of myself, Monroe and Muhammad Munir JJ. K. L. Gauba has appeared in person to show cause. He admits the publication and circulation of 500 copies of the book. He has taken the following preliminary objections to the proceedings: (1) That the Chief Justice has no power under the law to constitute the Bench. (2) That this Court has no jurisdiction to punish *brevi manu* any contempt *ex facie curiae*. (3) That because an application has been made by him to His Majesty through His Excellency the Viceroy under S. 220 (2) (b), Government of India Act, 1935, the proceedings should be stayed under S. 344, Criminal P. C.; and (4) That as the publication casts serious reflections on the Chief Justice and Monroe J., in their capacity as Judges of this Court, they are disqualified from sitting as members of this Bench.

d By S. 223, Government of India Act, 1935, the jurisdiction of the existing High Courts and the powers of the Judges in relation to the administration of justice, including the power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts as it existed before the commencement of Part 3 of the Act has been specifically preserved. Before the commencement of Part 3 of the Act, the Government of India Act, 1915, was in force which by S. 108 provided as follows:

"(1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the High Court, of the original and appellate jurisdiction vested in the Court. (2) The Chief Justice of each High Court shall determine what Judges in each case is to sit alone, and what Judges of the Court, whether with or without the

Chief Justice, are to constitute the several Division Courts."

Rule 1, Chap. 3-B, Rules and Orders, Vol. 5, of this Court specifies which cases are to be heard and disposed of by a Judge sitting alone. Rule 4 provides that except as provided by law or by the rules, or by special order of the Chief Justice, all cases shall be heard and disposed of by a Bench of two Judges. Rule 7 gives the Chief Justice the power to nominate the Judges constituting a Full Bench. It is therefore clear that both under S. 108 (2), Government of India Act, 1915 and the Rules of the Court the Chief Justice has the power to appoint a Full Bench for the hearing and disposal of a particular case. K. L. Gauba contends that summary proceedings for contempt are neither original nor appellate and that the Chief Justice's power to constitute Benches under sub-s. (2) of S. 108 is limited to cases which come to the High Court in the exercise of its original or appellate jurisdiction. Rule 4 of the Rules and Orders, however, is very general in its terms as it applies to all cases and not only to cases in the exercise of the original or appellate jurisdiction of the High Court. Nor do I think that the powers of the Chief Justice to appoint the several Division Courts is limited to the class of cases that is mentioned in the first sub-section of that section. But even if it is, I think that the word "original in sub-s. (1) of that section is used in contradistinction to the word "appellate" and therefore proceedings which are started by the Court itself can properly be described as original. The Chief Justice's power to nominate special Benches for the disposal of contempt cases has been recognized in 45 Cal. 169¹ at p. 227 8 Pat. 323,² and a decision of this Court in C. M. No. 15/L of 1941, in L. P. A. No. 39 of 1941.³ I therefore hold that this Bench has been properly constituted.

The question whether this Court can proceed *brevi manu* to punish contempts of its own authority and the contempts of the subordinate Courts has been the subject-matter of two Full Bench decisions of this Court in 6 Lah. 528⁴ and A.I.R. 1927 Lah. 610,⁵ the latter being a decision of five Judges. It is admitted that the Presidency High Courts and the High Courts of Allahabad and Patna are possessed of this jurisdiction. It is however contended that the Lahore High Court and the High Courts of Sind, Rangoon and Nagpur do not possess any such jurisdiction. I have already pointed out that two Full Benches of this Court have decided this question in favour of the existence of such jurisdiction. The Sind, Rangoon and Nagpur High Courts have also exercised the jurisdiction summarily to punish contempts. The case in I. L. R. (1941) Kar. 3,⁶ may be particularly

1. ('18) 5 A.I.R. 1918 Cal. 938 : 45 I C 338 : 45 Cal. 169 : 26 C. L. J. 459 : 19 Cr. L. J. 530 : 21 C. W. N. 1161 (S. B.), In re Moti Lal Ghose.
2. ('29) 16 A.I.R. 1929 Pat. 72 : 117 I. C. 180 : 30 Cr. L. J. 741 : 8 Pat. 323 : 9 P. L. T. 837 (F. B.), In re Murli Manohar Prasad.
3. C. M. No. 15/L of 1941 in L. P. A. No. 39 of 1941, K. L. Gauba v. The Punjab Cotton Press.
4. ('26) 13 A.I.R. 1926 Lah. 1 : 89 I. C. 833 : 26 Cr. L. J. 1409 : 6 Lah 528 : 26 P.L.R. 772 (F.B.), Emperor v. Sayyad Habib.
5. ('27) 14 A.I.R. 1927 Lah. 610 : 108 I. C. 775 : 28 Cr. L. J. 727 : 29 P. L. R. 294 (F.B.), In the matter of Muslim Outlook, Lahore.
6. ('40) 27 A.I.R. 1940 Sind 239 : 191 I. C. 519 : 42 Cr. L. J. 1 : I. L. R. (1941) Kar. 3, Emperor v. Tarapori.

referred to. Section 2, Contempt of Courts Act, 1926, expressly recognizes the power of the Chartered High Courts to commit for contempt. By S. 220, Government of India Act, 1935, every High Court, which is mentioned in S. 219 of that Act (and the Lahore High Court is such a Court) is constituted a Court of Record and the power to commit for contempt is a necessary incident and attribute of a Court of Record. Harris J. in (1850) 36 Mis. 341,⁷ observed as follows :

"The power to fine and imprison for contempt from the earliest history of jurisprudence has been regarded as a necessary incident and attribute of a Court, without which it could no more exist than without a Judge ; it is a power inherent in all Courts of Record and co-existing with them by the wise provisions of the Common law."

Similarly Grey C. J. in (1873) 114 Mass 238,⁸ observed as follows :

"The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other superior Courts, as essential to the execution and to the maintenance of their authority and is part of the law of the land".

In (1852-53) 8 Moore P. C. 47,⁹ their Lordships of the Privy Council laid down as follows :

"In this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court. It is within the competency of the Court to impose fines for contempt; and unless there exists a difference in the constitution of the Recorder's Court at Sierra Leone the same power must be conceded to be inherent in that Court . . . we are of opinion that it is a Court of Record, and that the law must be considered the same there as in this country."

These observations of the Privy Council are conclusive on the point. The High Court of Lahore is a Court of Record and therefore possesses the ordinary jurisdiction of a Court of Record to commit for contempt. The reasons why the Court must possess this jurisdiction and why it is not possible as suggested by K. L. Gauba, for a Judge to pursue a remedy for libel or slander in a civil or criminal Court, are stated as follows by Courtney-Terrell C. J. in 8 Pat 323² :

"It must be remembered that a Judge by reason of his office is precluded from entering into controversy in the columns of the public press. Whether the comments be of a permissible or of an improper character he cannot enter the arena and do battle with his adversary upon equal terms. A Judge of a superior Court is moreover precluded by considerations of decency from having recourse to the remedy available to any other citizen of whom defamatory words are spoken or written, that is to say, of taking proceedings for libel or slander before the ordinary tribunals which are subject to his own jurisdiction and he requires therefore in the exercise of his office a special protection in order that his authority and dignity may be maintained".

Reference may also be made in this connexion to the following words of Kent C. J., in (1810) 5 Johnson N. Y. 282¹⁰ :

"Whenever we subject the established Courts of the land to the degradation of a private prosecution we subdue their importance and destroy their

authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society and to overthrow those institutions which have hitherto been deemed the best guardians of civil liberty."

If a Court of Record was not possessed of this summary jurisdiction to punish contempt of itself by summary procedure it would not function. I hold that we have the power to proceed summarily in this matter. No authority has been cited in support of the proposition that the Criminal Procedure Code is applicable to summary proceedings taken for punishing a contempt. But even if S. 344 of the Code be applicable, I am not disposed to adjourn the proceedings because in a case where the Court is scandalised and an attempt is made by a scurrilous publication to undermine and impair the authority of the Court, immediate action is necessary with a view to vindicate the authority of the Court. I therefore disallow the application for adjournment. As already stated the provisions of the Code of Criminal Procedure are not applicable to the present proceedings. Section 556 therefore does not apply. (1900) 2 Q. B. 361¹¹ is an authority for the proposition that "proceedings for punishing contempt are taken not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but with a view to protect the public and specially those who either voluntarily or by compulsion, are subject to the jurisdiction of the Court, from the mischief they will incur if the authority of the tribunal be undermined or impaired. The gravamen is an endeavour to shake the confidence of the public in the Court." Woodroffe J. in 45 Cal. 169¹ at p. 199, observed as follows :

"As regards jurisdiction, a number of stale objections were taken. It is not necessary to go into the history and nature of contempt. It is too late now to contend that we have no other jurisdiction than that conferred by the Penal Code, or that in exercising this jurisdiction we are Judges in our own cause. The jurisdiction has been approved many years ago by, amongst other Judges, their Lordships of the Privy Council. The second observation applies to all cases of contempt, and if it were given effect to, the Court would be deprived of its jurisdiction in every case. In the present one the Court, as it is entitled to do, issued the rule of its own motion. The Court, however, in such cases does not seek to vindicate any personal interests of the Judges, but the general administration of justice, which is a public concern."

If there was any force in this contention, the contemner with a view to oust the jurisdiction would have merely to scandalise not a particular Judge, but all the Judges of the Court as a whole in order to escape from punishment. In such cases the practice has been for the Judges who have been defamed to hear the case and to state in their judgment the facts within their knowledge or their reasons for taking a particular course of action. The Judges concerned sat in the following cases : 45 Cal. 169¹ 8 Pat. 323² and 44 I. C. 930¹². The same practice was followed in a recent Allahabad

11. (1900) 2 Q. B. 36 : 69 L. J. Q. B. 502 : 82 L. T. 534 : 48 W. R. 474 : 64 J. P. 484 : 16 T. L. R. 305, R. v. Gray.

12. (18) 5 A.I.R. 1918 Cal. 713 : 44 I. C. 930 : 19 Cr. L. J. 402 : 26 C. L. J. 345, In the matter of William Tayler.

* See also (1906) 1 K. B. 32 (40) [Ed.]

7. (1850) 36 Mis. 341, Watson v. Williams.

8. (1873) 114 Mass 238, Cartwright's Case.

9. (1852-53) 8 Moore P. C. 47, William Rainy v. The Justices of Sierra Leone.

10. (1810) 5 Johnson N. Y. 282, Yates v. Lansing.

case where Sir Iqbal Ahmad C. J., had been maligned by the "Hindustan Times," and he himself was one of the Judges who heard the case.

While it is unpleasant for any Judge to have to sit in judgment in a case in which he has been personally attacked, I consider that it is his duty to do so where, as in this case, he has been the subject of a malicious and impudent publication containing imputations which are obviously false and of the falsity of which he himself has the best knowledge. I would go further and say that he has no alternative but to sit as the authorities to which I have referred clearly indicate that it is impossible to vindicate the reputation of the Court which has been attacked by taking proceedings in any Court for libel or otherwise. The sole object of these summary proceedings is to vindicate the prestige of the Court. They are not to establish the position of an individual Judge. Unless an answer in this case is given to the scandalous allegations made against me and my brother Judge, the position of the High Court which has been attacked cannot be said to be re-established. It is for these reasons that Monroe J. and myself have taken part in these proceedings. No other Judges could be in a position to answer the allegations, and there may be persons who have read this book, and do not know the author, who might be impressed by it.

The respondent filed a list of 25 witnesses whom he wished to examine with the object of proving that the allegations made by him in the book were true. This application is entirely misconceived and is based on the assumption that where a person has scandalised the Court or the Judges by broadcasting a publication imputing injustice, dishonesty, corruption or improper motives to them in their judicial capacity it is open to him to show that the allegations are true. I have no doubt that this course is not open to the respondent and that any attempt to justify a libel on a Judge by attempting to show that the libel was justified would itself be a fresh contempt. A contemner who has been called upon to show cause why he should not be punished for an attack on the Court or its Judges does not occupy the position of a defendant in a libel action where he may plead or prove justification or the position of an accused person in a prosecution for defamation.

"By our constitution," observed Wilmut J. in his undelivered judgment in *Almon's case*, "the King is the fountain of every species of justice which is administered in this Kingdom. The King is de jure to distribute justice to all his subjects and because he cannot do it himself to all persons he delegates his powers to his Judges who have the custody and the guard of the King's oath and sit in the seat of the King concerning his justice."

"The arraignment of the justice of the Judges is arraignment of the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken it is the most fatal and most dangerous obstruction of justice and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever, not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people."

There is not a single case on record, except one to which reference will presently be made, where a person guilty of scandalising the Court pleaded or

attempted to prove that the libel was true. In A. I. R. 1935 All 381¹³ an attempt was made by the contemner to call evidence to prove his allegations but the Court refused to call the witnesses and held that there can be no justification of contempt of Court. Even assuming that the writer of a manifesto believes all he states therein to be true, if anything in the manifesto amounts to contempt of Court, the writer is not permitted to lead evidence to establish the truth of his allegation. In (1894) 1 Ch. 347,¹⁴ Chitty J. observed in a contempt case as follows:

"The plaintiffs' counsel not only admitted, but boldly asserted, and made it part of their argument, that the circular was libellous, and that they could justify the libel, and they referred to some of the evidence which apparently had been adduced for the purpose of sustaining the justification. But the evidence and the argument founded on it are irrelevant on this motion."

In A. I. R. 1935 Cal 419,¹⁵ Mukerji J. at p. 432 describing the characteristic of proceedings to punish *brevis manu* contempt of Court observed that in such proceedings the contemner is precluded from taking a plea of a defence. For the reasons given, I disallow K. L. Gauba's application to examine witnesses. I now will deal with the book, the publication of which constitutes the contempt of Court for which K. L. Gauba stands charged. This book contains most scandalous allegations of improper and even corrupt motives against Judges of this Court. It is, therefore, deliberately calculated to interfere with and bring into contempt the administration of justice in this province and to lower the prestige of this Court. The allegations in this book that Division Benches were specially appointed, cases transferred to the High Court from the lower Courts, Judges selected to deliver previously conceived and dishonest judgments, etc., etc., would be futile unless a motive was provided. Naturally, it would be asked why the Chief Justice did all these things. To Gauba this presented little difficulty. He knew that Khwaja Nazir Ahmad earned considerable sums by way of commission as Special Official Receiver and as Liquidator. He knew that there are many persons in the Punjab who think that no one can do anything simply because he thinks it to be right and proper, but that he must have a *mutlub* or improper motive based on self-interest. The motive therefore was easily provided: he alleges that I have done all these things to provide commissions for Khwaja Nazir Ahmad in order that I might share them. He knew one other fact: I had bought a property in France in 1937; nothing was easier than to say that the purchase price was provided by my share. Unfortunately however for this malicious fiction there exists a file in the High Court which destroys it. When the keystone is extracted the whole fabrication, so laboriously constructed, falls into a heap of rubbish.

The motive for the publication of this book is obvious from the book itself. In 1935 a Full Bench of this Court over which I presided ordered the compulsory winding up of the Peoples' Bank of Northern India Ltd. of which Lala Harkishen Lal,

13. ('35) 22 A. I. R. 1935 All. 38 : 155 I. C. 38 : 36 Cr. L. J. 620 : 1935 A. L. J. 46, In the matter of Ram Mohan Lal.

14. (1894) 1 Ch. 347 : 68 L. J. Ch. 328 : 70 L. T. 228 : 42 W. R. 328, Coats v. Chadwick.

15. ('35) 22 A. I. R. 1935 Cal. 419 : 156 I. C. 1055 : 36 Cr. L. J. 1053 : 63 Cal. 217 : 61 C. L. J. 375 : 39 C. W. N. 770 (F. B.), In re Tasher Kanti Ghose.

father of the author of this book, was the chairman and managing director. The cause of the failure of the bank was that Lala Harkishen Lal had taken sums of money amounting to over a crore of rupees from the funds of the bank for his own use and for the use of his various concerns. The inevitable result was that the bank was insolvent. In addition, it was necessary to enquire into the conduct of Lala Harkishen Lal and the other officers of the bank. I and other Judges conducted the public and private examinations of these officers. I had previously done so in similar cases in the Allahabad High Court. K. L. Gauba had for many years assisted his father as a director of the bank and as the director in charge of some of Lala Harkishen Lal's other concerns until his father dismissed him and instituted suits against him alleging fraud which resulted in a decree against him for Rs. 75,000. As a result of the investigation into the affairs of the Peoples Bank the Official Liquidator filed a report in the High Court. The Government Advocate's opinion was taken. As a result K. L. Gauba was prosecuted for fraud but was acquitted. During the course of the liquidation Lala Harkishen Lal was adjudicated insolvent. Harkishen Lal and his other son Jiwan Lal Gauba continually defied the orders of the High Court and were committed to jail for these contempts. Jiwan Lal Gauba was also prosecuted and convicted for embezzlement. In his grounds of appeal to the Privy Council against his conviction, Jiwan Lal Gauba also attacked Judges of this Court but his appeals in the criminal case and in the contempt matter were rejected by their Lordships.

As a result of K. L. Gauba's indebtedness to the Punjab Cotton Press Company—one of Harkishen Lal's Companies—he was in 1941 adjudicated insolvent. He had therefore to leave the Legislative Assembly of which he was a member and the learned Judge who adjudicated him insolvent ordered in December 1941 his prosecution on charges of forgery and perjury. In the various proceedings in the High Court arising from the petition for his insolvency five High Court Judges dealt with the matter at different times. K. L. Gauba filed a petition to the Federal Court against the refusal of these Judges to grant him certificates for an appeal to that Court. In this petition he made scandalous accusations against all these Judges. The petition was dismissed. Shortly after the order for his prosecution was announced he published this book. From the book itself, it is clear that he considers that I and the Company Judge are chiefly responsible for his downfall and that of his relations. The other person attacked in this book is Khwaja Nazir Ahmad, the Official Liquidator of the Punjab Cotton Press Company, who was responsible for filing the petition for his insolvency. He also filed a complaint against Khwaja Nazir Ahmad in the criminal Courts. In the recent proceedings in this Court he has attacked those Subordinate Judges who had been dealing with his cases. From the book it appears that as early as 1936 he presented a petition to His Excellency the Viceroy in which scandalous allegations were made against the High Court. It is obvious, therefore, that the technique of this man is to attack and abuse all judicial officers, who, in accordance with their duty, have to decide cases in which he is interested. He has hoped, and hopes no doubt, to intimidate any Judge who may have to decide cases in which he is involved. This by itself is a gross contempt of Court. Any Judge who was influenced by this type of campaign would be failing in his duty.

The main allegation round which the book is constructed is that I had appointed Khwaja Nazir Ahmad as the Receiver of the estate of Harkishen Lal when he was declared an insolvent, and afterwards as Special Official Receiver, for the purpose of giving him large commissions with a view to sharing them. The facts are:—I came to this Court in May 1934. I did not know Khwaja Nazir Ahmad personally until October 1935. He was first appointed during my absence by Addison J., then acting as Chief Justice, during the summer of 1935 as legal adviser to the Peoples' Bank and subsequently by Monroe J. in consultation with Addison J. as Interim Receiver in a civil case pending against Harkishen Lal. During the long vacation, Currie J. had also appointed him Receiver of the Swat timber business of Harkishen Lal. In November of that year, on my return, I carried on these appointments by appointing him Interim Receiver in Harkishen Lal's estate after consulting the three Judges who had confidence in him and fixed his remuneration at Rs. 1000 a month. In March 1936 the question arose as to who would adjudicate on the claims against the estate of Harkishen Lal. In order to save the time of one of the Judges it was suggested that the Receiver of the estate should be made an Official Receiver under S. 57, Provincial Insolvency Act. Legal objections were raised and the matter was referred to the Government Advocate and the Legal Remembrancer who gave an opinion that the jurisdiction of the Official Receiver should be co-terminous with the jurisdiction of the High Court and on this Government agreed to the appointment of a Special Official Receiver and Khwaja Nazir Ahmad, then acting as Receiver of the estate of Harkishen Lal, was appointed on my recommendation. The question then arose of the remuneration to be given to the Special Official Receiver. I pressed that he should be appointed on a salary basis of Rs. 1500 a month and that the commission which he had earned should be credited to Government. It was pointed out to Government that the commission he had earned and would earn would pay for his salary for some years. In February or March 1937, I saw Sir Donald Boyd, then Finance Member, and pressed this proposal. He, however, refused to consider it as the new Government under the new constitution would shortly take office. He considered that the matter should be settled by the new Government. He thought that the Special Official Receiver should draw the normal commission meanwhile. The matter was again taken up with Government and it was agreed that he should be remunerated on a full commission basis at 5 per cent. as provided by the rules of the High Court. In accordance with this arrangement, I allowed him to draw a portion only of the commission then due. Meanwhile the shares of the Bharat Insurance Company had been sold in July 1936. I ordered that no commission on the sale of these shares should then be paid. In April 1938 I saw Sir Sikan-dar Hayat Khan, the Premier, and also addressed a letter to him on 19th April 1938 extracts from which read as follows:

"I strongly recommend the proposal that the Special Official Receiver should be made a Government servant. When I talked to Boyd before he left his main reason, I think, for not considering it was the advent of the new constitution. He did not wish to enter into a permanent arrangement at that time. In order to make the scheme even more profitable to Government I would suggest that out of the commission realized by the Khwaja Sahib he should get 1/3rd which will be payable to Govern-

ment. The remaining two-thirds will be payable to his assistants (this refers to interim receivership) in civil cases in lower Courts . . . There are four main reasons for my pressing for this appointment. The first is that it is very necessary, in my opinion if justice is to be done in all cases, for Government to have a permanent paid Official Receiver and Official Liquidator attached to the High Court. There will thus always be a fund for carrying on work which otherwise would not be possible for the Liquidators or the Receivers to do. The second is that it will stop all talk with regard to the amounts earned by private receivers and liquidators appointed by the High Court. The third point is that Government would no doubt make a profit on the transaction. The fourth is that I know of no one who could carry out the duties more efficiently or honestly than the Khwaja Sahib. I have wanted this to be done for a long time now, and I do hope that your Government will come to a favourable decision in the matter at an early date. I would recommend of the two alternatives in the note (a) a permanent pensionable post at Rs. 1500-100-2000."

This proposal was not agreed to by Government, and only thereafter Khwaja Nazir Ahmad drew his full commission as provided by the rules of this Court. It will be seen therefore that far from wishing Khwaja Nazir Ahmad to draw commission I did all in my power to prevent him doing so. He suggests in his book that the property I bought in France in November 1937 was paid for out of the proceeds of the commission paid to Khawaja Nazir Ahmad. To purchase this property I ordered my Bank in London to sell certain securities which I held and the whole purchase price was paid from this source. The property was purchased therefore at a time when I was doing my utmost to prevent the Official Receiver being paid on a commission basis. The vague suggestion also made that I had an interest in the commission earned by the Official Liquidator of the Peoples Bank is equally false. It is alleged that I allowed Khwaja Nazir Ahmad to draw Rs. 50,000 commission for the sale of the property of the Punjab Cotton Press Company in advance, i. e., before the sale proceeds had been realised. The facts are that never has any advance commission been allowed and I had nothing to do with the drawing of this commission. The properties of the company were sold during July 1939. The sale was confirmed by Din Muhammad J. as company Judge on 11th July 1939. The Official Liquidator drew his commission during September 1939 after realising the sale proceeds and while I was in Europe. It is alleged that I appointed Khwaja Nazir Ahmad as Official Liquidator of this company and removed Mr. Bhagwati Shankar for an improper motive. The fact is that this company was a respondent in misfeasance proceedings brought by Mr. Bhagwati Shankar as Official Liquidator of the Peoples Bank and he was therefore relieved of his duties in respect of the Punjab Cotton Press, as he could not be both petitioner and respondent.

He alleges in the book that one Mrs. Irene Moore had been "deprived of her inheritance" in a Letters Patent Appeal heard by a Bench of which I was a member. It is difficult to believe, as he mentions this matter, that he was not acquainted with the judgments of no less than three Courts in this case. Neither I nor my learned brother who heard the appeal knew anything about the parties. The facts are that an old lady had died and left a will. This will was contested in the Court of the Additional District Judge, Lahore, by Mrs. Irene Moore. She alleged that the will was not executed, that the tes-

tator was insane and that there had been undue influence. These were the only points for argument before us. The learned Additional District Judge pointed out that the evidence of "insanity" was that the testator on the death of her husband, some two years before she made the will, had not slept for some time, had visited her husband's grave every week and used to take Hall's wine. He found there was no evidence of undue influence. It was proved by the evidence of the House Surgeon of the Mayo Hospital and the witnesses to her signature that the testator had signed the document and one of these witnesses—a Doctor—proved that her state of mind was normal at the time. The testator after the will had been executed went to England on a visit. Mr. Irene Moore appealed to the High Court and her appeal was heard by Jai Lal J. who agreed with the findings of the lower Court. In the Letters Patent Appeal before us there being concurrent findings of fact in the two lower Courts, and the facts being clear, her appeal was dismissed. He alleges that Khan Sahib Mian Hakim Din, who was the Additional District Magistrate, Lahore, had in 1935 passed an order at 10 P. M. at his house releasing on bail the directors of the Bharat Insurance Company against whom a case of criminal breach of trust had been lodged and that he was shortly afterwards replaced by another Additional District Magistrate "who brought with him a reputation more to the Chief Justice's liking." The allegation of course clearly is that I had the Additional District Magistrate transferred because I objected to his order. I have only to quote a letter received by me from the Chief Secretary to the Punjab Government, which reads as follows :

"From the record of services I find that Abdul Hamid was Additional District Magistrate up to 13th November 1935. He then went on leave and his place was taken temporarily by Hakim Din. This was only a makeshift arrangement, as the regular Additional District Magistrate, Isar, arrived and took over on 11th January 1936. I need hardly say that the High Court was not consulted in respect of any of these moves."

He alleges that in the case of the Ambernath Woollen Mills, Bombay, which came before a Bench consisting of myself and Monroe J. we decided that this property belonged to the Peoples' Bank simply because the value of the Mills had improved but that if the value had deteriorated we would have held otherwise. The facts are made clear in the judgment which K. L. Gauba must have read and are:—Harkishen Lal without authority of the board and wholly illegally had taken two lakhs forty thousand rupees from the funds of the Peoples' Bank and had bought this property in Bombay in his own name with this money. The Official Liquidator of the Peoples' Bank claimed this property as the money belonged to the Peoples' Bank. We did not decide that the property belonged to the bank: We merely decided that under S. 185, Companies Act, the Official Liquidator was prima facie entitled to the property. We pointed out that the Court was not authorised under this section to come to a final decision as to title and we left it to the Official Liquidator to take such action as he might be advised. The question whether the value of the property had deteriorated was obviously not material to the point to be decided. The matter was subsequently dealt with by the Official Receiver of Harkishen Lal's estate who treated the property after contest in Court as belonging to the estate of Harkishen Lal and admitted the claim of the Official

Liquidator of the Peoples' Bank as a lien-holder to the extent of the purchase price.

Before the Special Officer Receiver practised at the Bar he was a partner of a firm known as "Lalla & Company." It is alleged in the book that I was a partner in the firm. I did not know even the name of this firm until this book was published. There is a long chapter in this book dealing with what is called the "Battle of the Bharat." The facts are that Harkishen Lal held a controlling interest in the shares of this insurance company. On his insolvency the value of these shares fell from Rs. 130 to Rs. 70. The shares were properly transferred to the Official Receiver of Harkishen Lal's estate by consent of the company. The Official Receiver being an officer of this Court, it was the duty of the Court through the receiver to see that the affairs of the Bharat Insurance Company were properly administered, particularly when it was known that Harkishen Lal had depleted the funds of this company to the extent of over rupees fifty lakhs. It was feared that this company as well as the Peoples' Bank might, because of Harkishen Lal's financial methods, be forced into liquidation. It was obviously the duty of the receiver to save the Company, if possible, in the interests of the creditors of Harkishen Lal and to nurse the shares so that they might be sold at a proper value. One director lost his qualification shares as they belonged to the estate of Harkishen Lal; another director, Jiwan Lal Gauba, sold his shares and lost his qualification as a director and therefore the directors of the company co-opted R. B. Binda Saran, Dewan (now Mr. Justice) Ram Lall, Sardar Amer Singh and the Official Receiver as directors of the company. It is alleged that these co-opted directors did not, on my order, pay for their qualification shares. The fact is that they wished to pay for their shares but the Official Receiver very properly refused to sell the shares at the then low market value. The Special Official Receiver credited all his director's fees during the time he held office to the estate of Harkishen Lal. With the appointment of this new directorate the confidence of public was to a large extent restored.

The Official Receiver in the mean time had got in touch with all the principal share-brokers in India with the result that two offers were received, one for rupees ten lakhs twenty-five thousand from Delhi and the other for rupees ten lakhs thirty thousand from Seth Ram Kishen Dalmia who had stipulated that his offer should only be open until 13th July 1936. The Special Official Receiver, therefore, had to deal quickly with this offer as it was an excellent offer considering the market value of the shares. He obtained the consent of the representative of Seth Ram Kishen Dalmia to extend the offer until 16th of July and to treat it as the opening bid. It was necessary to hold an auction as there were two rival groups bidding for the shares. The Official Receiver conducted the auction in the High Court under the supervision of Din Muhammad J. and myself and the shares were sold at rupees eleven lakhs. The policy of the Official Receiver in nursing the shares was thus fully justified to the benefit of the estate of Harkishen Lal. It is untrue, as alleged, that the interference of anyone at Simla was responsible for the sale of these shares. It is necessary to deal with another scandalous allegation made in this book, which was also made by Jiwan Lal Gauba in his appeal to the Privy Council. The allegation is that I sitting alone passed an order in connection with the transfer of the shares to the Official Receiver but that in order

to make it a Division Bench decision and so as to avoid an appeal, I subsequently obtained the signature of Monroe J. to the order. In the first place, the order was a consent order and, therefore, no question of a Letters Patent appeal arose, and, secondly, I have before me a letter, dated 16th February 1937 from Mr. Abdul Haye (now Hon'ble Abdul Haye, a Minister of the Punjab Government) who was acting as counsel for one of the parties, in which he says: "I distinctly remember that the Hon'ble Justice Monroe was present when the Hon'ble Chief Justice wrote the order referred to." This letter was written for the Privy Council proceedings in J. L. Gauba's appeal.

K. L. Gauba deals at length in the book with the Tribune case which was transferred by me to the High Court. It is alleged that I transferred this case even before it was instituted in the lower Court. This case, obviously a case affecting important interests, ought to have been transferred and was transferred on an affidavit by Professor Ruchi Ram Sawhney that the case had in fact been instituted in the lower Court. When the case appeared in the High Court, counsel for the Tribune welcomed the fact that the case had been transferred. I may say that I never had before that date the pleasure of meeting Professor Ruchi Ram Sawhney. It is alleged that I wished the Special Official Receiver to be made a member of the Tribune trust. This is untrue. He further says that the Official Receiver, who had been appointed Interim Receiver in this case, remained receiver for three years. The fact is that the interim receiver remained for three days only and then by consent of the parties the records of the company pending the hearing of the case were kept in the custody of a special staff of the High Court to which records both parties were allowed access. The records remained at the premises of the Tribune press which carried on its business in the ordinary way. He mentions, and makes scandalous allegations concerning some divorce case, particulars of which are not given and very prudently not mentioning the names of the parties. There is no such case and the allegations are false. It is alleged in the book that I confirmed an irregular sale of the properties belonging to Mohammad Fazal Illahi insolvent "in a frantic hurry for some reason." The facts are that the two principal secured creditors, Rai Bahadur Bawa Dinga Singh and Lala Bulaqi Mal, on or about 19th December 1936 asked for the sale to take place during the Christmas Holidays so as to attract people from the mofussil who would normally be in Lahore during the Christmas Holidays. To this I consented. The sale was advertised in all the leading papers of the Province and in Delhi. The sale was held on various dates from 29th December to 1st January. Six important bidders came from outstations to Lahore. The bungalows and the land on Race-course Road were sold for the following amounts, and, for comparison purposes, I give the valuation of the Assistant Collector of Lahore which valuation he had arrived at by consent of parties, i. e., R. B. Bawa Dinga Singh and Ch. Mohammad Fazal Illahi in execution of a decree:

Bungalow No.	Collector's Valuation.	Sale Price.
20	Rs. 43,663	Rs. 87,000
22*	" 43,130	" 85,000
24	" 44,266	" 80,000
26	" 48,659	" 75,000
28	" 68,992	" 1,00,000

The question of the pendency of the suit by the minor son of the insolvent could not affect, as

^a alleged in the book, the sale conducted by the Official Receiver because the intending purchasers were informed of the pendency of the suit and were buying subject to the result of the suit. The sale of these properties was confirmed in my Chambers on 4th January and not on the 2nd as alleged. Most of the bidders were present and higher bids were received. It is alleged that Begam Mohammad Fazal Ilahi had been forced by contempt proceedings to withdraw the suit. The facts are that this lady interfered with the possession of the Receiver and the discharge of his duties by issuing a notice that no one should bid at the sales because an injunction had been issued forbidding the sale, which was untrue, and by removing certain properties. The lady appeared in Court by counsel on both hearings of the contempt proceedings and admitted the contempts and apologised and she was discharged without punishment. The contempt proceedings were in January and February 1937. She did not withdraw the suit until April of that year on the ground of want of funds. The question of the proper court-fee was still under consideration.

^b A great deal has been said concerning the contempt proceedings against Tahir Khan and Idris Khan, who were respectively Managing Agent and Director of the Kanwal Movietone Limited. This Company had been ordered to be wound up. There was a petition for misfeasance against the officers of the Company. A complaint also had been lodged under various sections of the Penal Code against Tahir Khan. Several affidavits were filed in the High Court alleging that these men had threatened and attempted to suborn witnesses and that they had lodged false criminal cases in Bombay against the Official Liquidator in order to intimidate him and prevent him performing his duties. Amongst those who filed affidavits were Khawaja Feroze-ud-Din, a Barrister-at-law of standing and Sheikh Abdul Haque, P. C. S. These gentlemen proved admissions by the respondents as to the false complaints in Bombay. When the contempt case came before the Court, although there was no reply by affidavits to the very serious charges which had been made, all, except two, of those who had filed affidavits were put into the box for cross-examination. They were cross-examined by Sir Abdul Qadir, who appeared for the respondents. Some of the serious allegations were not questioned in cross-examination, and counsel for the respondents did not put his clients in the box to contradict the evidence or the affidavits. Both the affidavits therefore and the evidence were unchallenged. It was clearly proved therefore that these men had tampered with witnesses and that they had admitted that the cases ^c filed in Bombay were false and filed for the purpose of 'taking the offensive' against the Official Liquidator.

The Official Liquidator had been sent to Bombay by the Company Judge to take the statements of some witnesses. The complainants filed cases against him in Bombay alleging inter alia that he had impersonated a High Court Judge. The respondents eventually apologised and purged their contempts and were released from jail. In subsequent proceedings, Zora Khatun, one of the complainants in Bombay, appeared in Court and swore that she was told, that she was applying merely for a certified copy of her statement before the Official Liquidator and that when she discovered that she had filed a complaint she had it dismissed. Her cousin, who had filed another complaint, said that he had been made to lodge the complaint and he apologised. Tahir Khan and Idris Khan had stated that they

had nothing to do with the complaints but their lawyer in Bombay admitted that he had been engaged and paid by Tahir Khan. It was also alleged that non-bailable warrants had been issued against one Nariman as he had not filed a list of witnesses. The truth is that while this man was in Court the Judge ordered contempt proceedings to be taken against him and he then decamped. It was for this reason only that the warrants were issued. It is difficult to understand what other action than that taken could have been taken by this Court in this matter.

It is alleged that the first appeal from order, Sheikh Mohammad Saleh v. Sheikh Abdul Hamid, was originally in the list of Dalip Singh J. and that I for an improper motive removed this case to the list of Monroe J. The facts are that this case first appeared in the Weekly List of 4th December 1939 in which, of course, it was not allotted to any Judge. On the same day however, in Dalip Singh J.'s Daily List another case, Execution First Appeal, Saleh Mohammad v. Barkhurdar Shah, appeared. The case of Sheikh Mohammad Saleh appeared for the first time in the Daily List of Monroe J., on 8th December and was heard on 8th, 11th and 12th December 1939. The case of Saleh Mohammad was disposed of by Dalip Singh J. on 4th December. Sheikh Mohammad Saleh's case could not have appeared in the list of Dalip Singh J. before 4th December because it had not come on to the Ready List before that date. The allegation that this case had been on the list of Dalip Singh J. and had been removed from it is false. I refrain from commenting upon the allegations concerned with the conduct of Khwaja Nazir Ahmad, as that is a matter which will come before the High Court. I have dealt with enough to show the nature of the author of this book and that he has an utter disregard of truth. ^d I do not attempt to deal here with every allegation, but I say generally that where any improper motive is alleged it is false. There are however one or two other matters with which I think it necessary to deal. The first is that it is alleged that I deprive litigants of their rights in the High Court by ordering certain cases to be heard by a Division Bench instead of being originally heard by a Single Judge. It is one of the functions of the Chief Justice to select Judges for ordinary and Special Benches, and a Chief Justice is bound to do so. In discharging this duty I have been influenced only by the consideration of having the work of the Court done as expeditiously and efficiently as possible. It has always been my policy and I am not unique in this — where law-points of importance are to be decided, and where there obviously would be an appeal, that they should be heard by a Division Bench. There ^e are obvious advantages in this course. In the first place, it saves the time of the Judges—two Judges dispose of a case instead of three. Secondly, it is convenient to litigants as it saves their time and costs, and, thirdly, when there were many arrears in the High Court, it was obviously advantageous to save the time of the Judges. It is also to be noted that in most of these cases there is a right of appeal to the Privy Council.

It is complained that Letters Patent appeals in company matters come to my Bench. This is true. It was suggested by a learned Judge of this Court when I first came here that if the same Bench heard similar kinds of cases, there would be more efficient disposal, and the files of appeals in the High Court were gone through then in order that this might be done, but it is untrue that all Letters Patent appeals in company matters come before the same Judges.

In addition to important law-points coming before the company Judge which were referred, as pointed out above, to a Bench at once, my Bench has heard many appeals from the decisions of the company Judge himself. In these Letters Patent appeals, most of the Judges of the High Court have sat with me. I ordered these appeals to come to my Bench as in Allahabad and here I have had considerable experience in these matters, and when it was necessary to constitute a Special Bench to deal with important points coming before the company Judge I sat with him. Another point raised is the transfer of cases to the High Court. It is obvious that in certain cases there is great advantage in hearing a case in the High Court at once instead of the case being subject to lengthy proceedings in the lower Court and then an appeal to the High Court, especially in cases where important interests are involved and where expedition is required. These transfers have always been welcomed by the parties with the exception of the cases of Lala Harkishen Lal and K. L. Gauba. These latter cases were however obviously cases proper to transfer. The insolvency proceedings in K. L. Gaub's case were transferred because he is a master of delay and the report submitted to me showed that the execution cases against him had been dragged out in the lower Court for over two years. In most of these cases there is a Letters Patent appeal and an appeal to their Lordships of the Privy Council. In all these cases I have invariably allowed 14 days for lodging objections to the transfer and no case has been heard until this period has elapsed or objections disposed of. As regards these last matters, it obviously might be said that reasonable criticism should be allowed. I agree. But in this book the criticisms are not reasonable or bona fide and there is underlying all of them a suggestion or allegation of improper motives.

And lastly a great deal has been said in the book concerning Khwaja Nazir Ahmad. When I came to Lahore I knew no one at the Bar. In my absence on leave in 1935, this gentleman had been selected by three Judges for positions of trust. These Judges presumably had confidence in Khwaja Nazir Ahmad. He had done well and I therefore saw no reason for passing him over. Until last year no one — except in one instance — complained of his conduct, and in that case investigation of the facts by the complainant produced an apology from him. Although he conducted many sales, not one had been challenged in Court by either the insolvent concerned or his creditors.

I had been the Judge in charge of company matters in Allahabad, and I endeavoured there to set up a High Court department for conducting liquidations, the scheme being to have a permanent Official Liquidator on salary and pension with a suitable staff for the reasons given in my letter to the Premier in this judgment. When I came here and found the position as regards public companies very bad, I endeavoured, as I have shown, to persuade Government to enable me to do here what I had failed to do in the U. P. Unfortunately I did not succeed. Mr. Bhagwati Shankar was too busy with the liquidation of the Peoples Bank to supervise more work. I therefore thought that it might be possible to have a High Court Department which could carry out the idea in another way by having Khwaja Nazir Ahmad in charge with assistants, and that by this method liquidations and insolvencies which could not provide remuneration to those in charge could be undertaken. I still think such a department is very necessary if the public is to be

protected from unscrupulous exploiters of optimistic and credulous investors. The position — failing such a department — being that the more thoroughly the officers of a company loot the share-holders and creditors, so that no assets are left out of which a liquidator or a receiver can be paid by commission on realisations, the more certainly they escape punishment. The work already done in the High Court by the Liquidation Department has — and I think it will be generally agreed — resulted in much greater care being taken in the management of public companies with resultant benefit to the investing public.

Early in 1941, Gauba saw the end approaching. Insolvency proceedings were imminent. He wrote this book and let it be known that he had done so. It was common knowledge that he had written a book scandalising me. Although internal evidence shows that the book was completed by April 1941, he did not publish it then. He waited to see if I would — in order to avoid the scandal of publication — interfere in the proceedings against him. His wife by letter invited me to do so. Naturally I could not and did not interfere. The impudent tone of the book, its form, and some of its contents, especially despicable and lying allegations concerning my wife and myself, conclusively prove that it was never written as a petition to His Majesty in Council. When he had been adjudicated insolvent and a prosecution for forgery was ordered in December 1941, he, by adding a preface to the book, turned this black-mailer's weapon into a petition to His Majesty. We have by separate order found K. L. Gauba guilty of contempt of Court and have sentenced him to six months simple imprisonment.

MONROE J. — I agree with what the learned Chief Justice has said concerning K. L. Gauba's contempt in the writing and distributing of "The New Magna Charta" and in my opinion the contempt has been aggravated by his attitude in Court in persisting that his allegations of gross misconduct while acting in their judicial capacity against various Judges are true. There is one matter, which is discussed by K. L. Gauba and concerns me alone and though his discussion of it is in no way a contempt of Court, the method of treatment is illustrative of his methods. He writes at some length of an order made by me on 29th April 1940, in the late evening. His objection to the order, so far as I can discover, is that (so he states) it was made about midnight. I have examined the record: the facts are as follows: In the middle of the day on 29th April 1940, the Special Official Receiver reported to me that he had received information that property of Mr. E. L. Stiffles who had shortly before been declared insolvent was about to be removed from Stiffles Restaurant. On the letter containing the information I wrote an order directing him to take possession at the same time giving him verbal instructions to cause no inconvenience in the restaurant during working hours. Later the same evening (much earlier than midnight), the Special Official Receiver came to my house and stated that he could not use my order as authority for his action, because it was written on the letter from which he had learned of the removal of the property. I re-wrote the order on a separate sheet of paper and gave it to him. From a report made on 1st of May, it appears that Mr. Khanna, who was the lessee of the restaurant and furniture in it, on being asked to attorn to the Special Official Receiver said that he wished to take K. L. Gauba's advice. K. L. Gauba was sent for, came, and in the Special

Official Receiver's presence advised Mr. Khanna to refuse. I find also from the record that both K. L. Gauba and Mr. Khanna, when the matter afterwards came up in Court, expressed regret for their conduct on this occasion.

MUHAMMAD MUNIR J. — I agree with the learned Chief Justice and have nothing to add, except that I take this opportunity to contradict the suggestion by K. L. Gauba in the book that I saw the learned Chief Justice of Bombay in connexion with the criminal cases pending against Khwaja Nazir Ahmad in the Court of the Presidency Magistrate. This allegation is wholly untrue.

K.S./R.K.

*Order accordingly.***Cr. P. C. —**

(c) ('41) Chitaley, S. 260, N. 5 Pt. 19; S. 561A, N. 9.

('40) Mitra, S. 5 Page 41, N. 31; S. 480, N. 1261.

(d) ('41) Chitaley, S. 260, N. 5 Pt. 19; S. 344 N. 2.

('41) Mitra, S. 5 Page 41, N. 31; S. 344, N. 986.

(e) ('41) Chitaley, S. 556, N. 1.

('41) Mitra, S. 556, Page 1789, N. 1428.

Penal Code —

(f) ('36) Ratanlal, Page 41 Pt. 1.

* A. I. R. (29) 1942 Lahore 114 FULL BENCH

TEK CHAND, DALIP SINGH AND
BLACKER JJ.

Sohan Singh — Defendant —

Appellant

v.

Jagir Singh, Plaintiff and others,

Defendants—Respondents.

Second Appeal No. 673 of 1939, Decided on 2nd February 1942; case referred by Tek Chand and Abdul Rashid JJ., D/- 23rd December 1941, from decree of District Judge, Ferozepore, D/- 24th March 1939.

(a) Punjab Limitation (Custom) Act (1 of 1920), S. 7 (a) and Art. 2—Scope and applicability—Whether suit as framed is directly or of necessary construction one for possession on ground that alienation was not binding on plaintiff according to custom is question of mixed law and fact (Per *Dalip Singh J.*).

Article 2 as well as S. 7 (a) refer to a suit for possession brought on the ground that an alienation of such property is not binding on the plaintiff according to custom and, therefore, it is limited in its scope and does not apply to all suits for possession but only to those suits for possession which challenge the alienation in question directly. It would be a question of mixed fact and law in each case to determine whether the suit as framed should either directly, or of necessary construction, be held to be a suit for possession on the ground that an alienation of the property in suit was not binding on the plaintiff according to custom or whether it should be held not to be such a suit : ('35) 22 A. I. R. 1935 Lah. 313, *Approved*.

[P 116 C 2]

(b) Words and phrases—"Deed" and "document"—Distinction (Per *Full Bench*).

In ordinary language "deed" and "document" are not synonymous terms. "Document" is much wider in scope and means "something written, inscribed

etc. which furnishes evidence or information upon any subject." "Deed" on the other hand is a formal document of a non-testamentary character, capable of delivery, which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title or interest. Thus, while every "deed" is a "document" every "document" is not a "deed" [P 117 C 2]

(c) Interpretation of statutes — Alternative constructions equally open—Rule to be applied — stated (Per *Tek Chand J.*).

Where alternative constructions are equally open, that alternative construction is to be chosen which will be consistent with the smooth working of the system which the statute purports to regulate and that alternative is to be rejected which will introduce absurdity, uncertainty, friction or confusion in the working of the system : 1924 A.C. 185, *Rel. on*.

[P 117 C 2]

When each of the two meanings adequately satisfies the meaning of a statute, and great harshness is produced by one of them, the interpretation which least offends against the sense of justice should be adopted : 1900 A. C. 323, *Rel. on*.

[P 117 C 2]

* (d) Punjab Limitation (Custom) Act (1 of 1920), Art. 1 (Firstly) and S. 7—Word "deed" in Art. 1 (firstly) is not synonymous with "document" and does not include "will" — Ancestral property — Disposition by will—Suit by testator's heir for possession of property bequeathed—Terminus a quo held was date of plaintiff's knowledge of will and not date of its registration : (Per *Full Bench*) I. L. R. (1938) 19 Lah. 332=(38) 25 A. I. R. 1938 Lah. 158=178 I. C. 285 and 40 P. L. R. 35=(37) 24 A. I. R. 1937 Lah. 798=175 I. C. 577, *OVERRULED*.

The word "deed" in Art. 1 (firstly) is not synonymous with the word "document" and does not include a will. [P 117 C 1]

A person governed by custom made a disposition of ancestral immovable property by a written will on 31st August 1925, which was registered on 2nd September 1925 but his reversioner did not have knowledge of the execution or contents of the will till after the death of the testator in 1935. In 1937 the reversioner brought a suit for possession :

Held that the suit was not barred under S. 7 merely because the reversioner had failed to sue for declaration within six years of the registration of the will under Art. 1 : I. L. R. (1938) 19 Lah. 332=(38) 25 A. I. R. 1938 Lah. 158=178 I. C. 285 and 40 P. L. R. 35=(37) 24 A. I. R. 1937 Lah. 798=175 I. C. 577, *OVERRULED*; ('35) 22 A. I. R. 1935 Lah. 313, *Approved*. [P 116 C 1; P 117 C 1]

M. C. Sud — for Appellant.

D. D. Kapur — for Respondents.

ORDER OF REFERENCE

TEK CHAND AND ABDUL RASHID JJ. — The facts of the case are set out in detail in our order of 3rd May 1940 and it is not necessary to recapitulate them here. In that order we affirmed the finding of the Courts below that the plaintiff Jagir Singh was the son of Bhagwan Singh. We also held that Bhagwan Singh had duly executed a will (Ex. D/1) on 31st August 1925, and had got it registered on 2nd September 1925, whereby he devised the whole of his property to his other son, Sohan Singh defendant. The only question left for determination was whether the plaintiff's suit was

within limitation. On behalf of the defendant-appellant, it had been urged that the suit was barred under Punjab Limitation (Custom) Act 1 of 1920. That Act, however, applied to ancestral immovable property only, and as no enquiry had been made as to the nature of the property in dispute, the case was remanded to the trial Court under O. 41, R. 25, for enquiry and report on the following two issues: (1) Did Bhagwan Singh inherit the land and the house in dispute from his father Natha Singh? (2) When did the plaintiff Jagir Singh have knowledge of the execution of the will of Bhagwan Singh, Ex. D-1. The trial Court after recording the evidence has submitted its findings to the effect that (1) neither the land nor the house in dispute had been proved to be ancestral, and (2) that though the will was executed on 31st August 1925 and registered on 2nd September 1925, the plaintiff first had knowledge of it on some date between 10th November 1935 and 30th January 1936, i.e., within 14 months of the institution of the suit. The finding of the lower Court that the entire land was not proved to be ancestral appears to have been arrived at without a proper consideration of the evidence on the record. It is clear from the extract of the entries in the settlements of 1852-53 and 1885 and the subsequent jamabandis upto 1931-32, prepared and produced by the Special Kanungo, that the following khasra numbers are ancestral, they having been traced to have been held by the common ancestor, Tek Singh, father of Natha Singh and grandfather of the testator, Bhagwan Singh:

Jamabandi of 1931-32	Settlement of 1883-84	Settlement of 1852
124	= 105	= 483
129	= 109	= 476
156	= 127	= 456
648	= 535	= 84/284
702	= 577	= 210
724	= 590	= 224/225
1277/732	= 589	= 229
742	= 605	= 233
1086	= 849	= 606
1123	= 876	= 432 min.
1133	= 884	= 432 min.
1107	= 866	= 431,607
624	= 549	= 266
1103	= 862	= 606

Mr. Mehr Chand Sud for the defendant-appellant conceded that the land comprised in these khasra numbers was ancestral. The rest of the land (in khasra Nos. 6, 22, 32, 40, 60, 61, 72, 77, 93, 107, 689, 690, 1365/1287, 1266/1278, 924, 1183 and 10/240) however, has not been shown to have been held by the common ancestor. Nor is there any satisfactory evidence on the record to prove that the house and the appurtenant waras are ancestral. It is conceded that Bhagwan Singh had full authority to bequeath his non-ancestral property and the suit for possession of land in those khasra numbers and the house and the waras must fail for this reason alone. With regard to the land, which has been found to be ancestral, the question is whether the suit is within limitation. As stated above, Bhagwan Singh had executed the will on 31st August 1925, and it was registered on 2nd September 1925. Bhagwan Singh died ten years later in 1935, and it has been found as a fact that the plaintiff did not have knowledge of the execution or contents of the will until some time between 10th November 1935 and 30th January 1936. The suit was instituted on 7th January 1937, i.e., more than six years after the registration, but within 14

months of the date when the plaintiff had knowledge of the execution, of the will. For the defendant-appellant, it is contended that the plaintiff ought to have instituted a suit for a declaration, that the will of ancestral land was invalid according to custom within six years from the date of the registration of the will, as laid down in Art. 1, Punjab Act, 1 of 1920, and as he did not do so, his suit for possession is barred by S. 7 of that Act. In support of this contention, reliance has been placed upon 19 Lah. 332,¹ which had followed 13 Lah. 22,² A. I. R. 1933 Lah. 686³ and A. I. R. 1934 Lah. 913.⁴ To the same effect is the Single Bench ruling A. I. R. 1937 Lah. 798.⁵

The contrary, however, has been held by another Division Bench in A. I. R. 1935 Lah. 313⁶ that S. 7 does not apply to a case in which the so-called alienation had been effected by a will. It was observed that though the word 'alienation,' as used in Act 1 of 1920, is defined in S. 3 as including 'any testamentary disposition of property,' a suit to set aside a will is not governed by Art. 1, as the terminus a quo mentioned therein is the date of the registration of the 'deed,' which must be taken to have been used in the technical sense as meaning a 'document signed, sealed and delivered.' Reference was also made to S. 57, Registration Act, under which a copy of a registered will can only be supplied to the testator (or his agent) in his lifetime, and it is after his death that third parties are entitled to take copies. If, therefore, the testator lived for more than six years after the date of registration of the will, the reversioner or the other person affected by it, may not be aware of its contents and, therefore, unable to institute a declaratory suit. It could not have been intended by the Legislature that such a person would be deprived for all time to come of his right to question the 'testamentary disposition' merely because six years had passed from the date of its registration, though during this period he had no knowledge whatever of its contents. These objections, weighty as they are, were not accepted in 19 Lah. 332,¹ where it was held that the word 'deed' in Art. 1 cannot be said to have been used in a technical sense but is synonymous with a 'document.' As regards the hardship involved, it was pointed out that where the words of a statute are clear it is not for Judges to attempt to get round a statute and that such a suit must be held to be time-barred even though the plaintiff had, or could not have, knowledge of its terms before the period of limitation expired. In view of this conflict of decisions and having regard to the fact that the question is of considerable difficulty and importance and is frequently arising, we think that it should be settled by a larger Bench. We accordingly, refer the following question to the Full Bench:

- (38) 25 A.I.R. 1938 Lah. 153 : 178 I. C. 285 : I.L.R. (1938) 19 Lah. 332 : 40 P.L.R. 126, Naman v. Uttam.
- (31) 18 A.I.R. 1931 Lah. 702 : 134 I. C. 1040 : 13 Lah. 22 : 32 P. L. R. 556, Harnamam v. Mt. Tabi.
- (33) 20 A.I.R. 1933 Lah. 686 : 146 I. C. 1069 : 34 P. L. R. 261, Ahmed v. Mt. Allah Bibi.
- (34) 21 A.I.R. 1934 Lah. 913 : 155 I. C. 1104, Mohammad Ali Khan v. Anwar Husain.
- (37) 24 A. I. R. 1937 Lah. 798 : 175 I. C. 577 : 40 P. L. R. 35, Mohammad Hasan v. Mt. Itar Nishan.
- (35) 22 A. I. R. 1935 Lah. 313, Gopal Singh v. Thakar Singh.

a "A person governed by custom made a disposition of ancestral immovable property by a written will on 31st August 1925, which was registered on 2nd September 1925, but his reversioner did not have knowledge of the execution or contents of the will till after the death of the testator in 1935. Is his suit for possession, instituted in 1937, barred under S. 7 of Act 1 of 1920, because the reversioner had failed to sue for declaration within six years of the registration of the will under Art. 1 of the Act?"

The papers shall be laid before the Honourable the Chief Justice for constituting a Bench so that the case may be heard at an early date.

b **DALIP SINGH J.**—The plaintiff in this case, one Jagir Singh, was found to be the son of Bhagwan Singh. Bhagwan Singh had executed a will on 31st August 1925 and had got it registered on 2nd September 1925 whereby he devised the whole of his property to another son of his, Sohan Singh, who is the defendant in this case. The plaintiff brought a suit for possession of half share of the property on the ground that it was ancestral of his father and that Bhagwan Singh had therefore no power to make a disposition of it by will. The trial Court decreed the suit. On appeal the case was remanded for decision of certain issues but the suit was dismissed by the trial Court. The appeal to the District Judge was accepted and an appeal was then brought in this Court where the case was remanded for determining the nature of the property and the date of the plaintiff's knowledge of the will. The plaintiff had not framed his suit to contest the will but merely brought a suit on the ground that he was the heir of Bhagwan Singh. On remand it has been found that certain portion of the property is ancestral and qua the self-acquired property or the property not proved to be ancestral no question now arises. The plaintiff had been held to have knowledge of this will only after the death of his father. His father died in 1935 and the plaintiff is held to have had knowledge of it sometime between 10th November 1935 and 30th January 1936. The suit was brought on 7th January 1937. A Division Bench has referred the following question to the Full Bench :

c "A person governed by custom made a disposition of ancestral immovable property by a written will on 31st August 1925, which was registered on 2nd September 1925, but his reversioner did not have knowledge of the execution or contents of the will till after the death of the testator in 1935. Is his suit for possession, instituted in 1937, barred under S. 7 of Act 1 of 1920, because the reversioner had failed to sue for declaration within six years of the registration of the will under Art. 1 of the Act?"

d Thus, the only question referred to the Full Bench is the determination of the point whether the plaintiff's suit is or is not barred by limitation. Upon this point there are three authorities which are in opposition to each other. The first is a Division Bench ruling 19 Lah. 332.¹ The second is another Division Bench ruling reported in A. I. R. 1935 Lah. 313,² and the third is a Single Bench ruling, A.I.R. 1937 Lah. 798.³ In the first of these rulings it was held by the Division Bench that the word 'alienation' includes 'any testamentary disposition of property' by virtue of S. 3 of Act 1 of 1920. Under S. 6 of the Act therefore the suit for a declaration should have been brought within six years seeing that 'alienation' includes a testamentary disposition of property. A.I.R. 1935 Lah. 313² was dissented from on the ground that it was not for Judges, where the words are clear, to attempt

to get round a statute. It was therefore facts of that case that the registers been executed on 10th January 190 having been brought more than six years date, the suit for possession was clear. It seems to have been assumed with- sion that the word 'deed' in Art. 1 o (firstly) included a will. In the thir rulings, that is A.I.R. 1937 Lah. Bench ruling, it was held that on of the definition of the term 'alien wording of Arts. 1 and 2 of the same 'deed' was not used in the article in it is ordinarily used and that in should be read as equivalent to the w

In A.I.R. 1935 Lah. 313² a Div this Court pointed out that the word ordinarily include a will since the w narily meant 'a document signed, s vered.' Therefore an alienation by a be governed by Art. 1 (firstly) but w by Art. 1 (secondly), the alienation registered deed. The ruling however of the judgment also pointed out tha as S. 7 (a) referred to a suit for pos on the ground that an alienation of is not binding on the plaintiff accor and therefore it was limited in its not apply to all suits for possession b suits for possession which challengee in question directly. It is unnecessa poses of this case to go into this dist undoubtedly it exists, and it would mixed fact and law in each case to ther the suit as framed should eit of necessary construction, be held t possession on the ground that an al property in suit was not binding c according to custom or whether it not to be such a suit. The que however, to us may be answered case on different considerations an sideration is the question whether does include 'will' in Art. 1 (fir definition of the word 'deed' is given Laws of England, Volume 10, p. Edn. 2. 'Deed' is there defined as written on parchment or paper, intention or consent of some person named therein to make (otherwis of testamentary disposition), confi in some assurance of some interes of some legal or equitable right, or to undertake or enter into s duty or agreement enforceable at le or to do or concur in some other a legal relations or position of a part; ment or of some other person or cor with the seal of the party so express tion or consent, and delivered as and deed to the person or corporatio affected thereby."

It is unnecessary to give other de word 'deed', but it is clear from t also clear from other definitions suc Stroud's Judicial Dictionary, p. 48 that a deed does not ordinarily incl obvious that if a deed was held to ir Art. 1 (firstly) of Act 1 of 1920, th arise, similar to the present one, in the heir of the person making t knowledge of the execution or the will, he might, when he wished to sion of the property left by the testat

barred by limitation because the will had been registered by the testator and the testator had happened to survive the will by six years. It is difficult to imagine that the Legislature wished to confer testamentary power on persons who would not otherwise have had such a power, by making their wills, safe from attack provided they had registered the same and provided they survived the execution of the will or its registration for more than six years. No object that I can see would have been served by making any such attempt and there is nothing in the Act itself to suggest that the Legislature intended to do any such thing. The Legislature was concerned with securing the titles of persons to whom alienations had been made of ancestral or other property where such alienations could or should have been challenged within the time prescribed. But a will is not, as a rule, anything but ambulatory until the death of the testator. No title is passed until the death takes place and it is difficult to see why the Legislature should not have intended such alienations to be challenged at the only time when normally speaking they could be challenged, namely, after the death of the testator had revealed his intention to dispose of his property in any particular manner. I therefore see no reason why the word 'deed' in Art. 1 (firstly) of the Act should be construed as equivalent to the word 'document' and not be construed to have its ordinary meaning which would exclude a will. This is practically a complete answer to the question referred.

I would however like to point out that, without expressing any final opinion on it, so far as wills are concerned, whereas Art. 1 (secondly) (a) and (b) might well apply to the terminus a quo of limitation in such cases, (c) would present some difficulty for, as I have pointed out above, while 'alienation' may, by the Act, include testamentary disposition, yet until the death of the testator there is no disposition though there may be an intention to dispose and therefore the date on which the alienation comes to the knowledge of the plaintiff might still be after the date of the death of the testator and not before, even though the plaintiff was aware of the execution and the contents of the will. This point however it is unnecessary to decide and I have therefore merely stated it leaving it to be decided subsequently if and when the point becomes necessary to decide. For the present, I would merely hold that the suit of the present plaintiff is not barred under S. 7 of Act 1 of 1920. I would answer the question referred accordingly.

TEK CHAND J. — I agree with my learned brother that the question referred to the Full Bench must be answered in the negative. In 19 Lah 332¹ it was assumed that Art. 1 (firstly) of (Punjab) Act, 1 of 1920 applied to all cases where the "alienation" was by a registered instrument, the word 'deed' in the last column being taken to be synonymous with 'document' and therefore including a will. On this assumption the learned Judges following the golden rule of construction, that where the words of a statute are clear it is not for Judges to attempt to get round the statute, held that a suit for possession of ancestral immovable property in respect of which a will had been executed and registered by a person governed by Customary law was time-barred if no suit for declaration as contemplated in Art. 1 of the schedule had been instituted within six years from the date of the registration of the will, even though the testator had lived for more than six years from such date.

With great respect, I do not find any warrant for

giving the word 'deed' this extended meaning, no for applying the rule of construction abovementioned to the Articles in the Schedule of Act 1 of 1920. "Deed" is not defined in this Act or in the Indian General Clauses Act 10 of 1897, or the Punjab General Clauses Act of 1898, and there is no reason to suppose that the Legislature intended to use it in a sense different from that in which it is ordinarily used, especially when such meaning leads to a manifest absurdity. It is not denied that in ordinary language 'deed' and 'document' are not synonymous terms. 'Document' is much wider in scope and means "something written, inscribed, etc., which furnishes evidence or information upon any subject." (Murray's New English Dictionary Vol. III p. 573). "Deed", on the other hand, is a formal document of a non-testamentary character, capable of delivery, which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title or interest. Thus, while every 'deed' is a 'document'; every 'document' is not a 'deed.'

The learned counsel for the appellant argued that in common parlance the word "deed" is sometimes loosely used as meaning a document. But, even if that be so, it is a settled rule of interpretation that "where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to regulate and that alternative is to be rejected which will introduce absurdity, uncertainty, friction or confusion in the working of the system." (1924) A. C. 185.⁷ As observed by Lord Hobhouse, while delivering the judgment of the Judicial Committee in (1900) A. C. 323⁸ at p. 335 "where there are two meanings, each adequately satisfying the meaning of a statute, and great harshness is produced by one of them, that has legitimate influence in inclining the mind to the other, . . . it is more probable that the Legislature should have used the word in that interpretation which least offends against our sense of justice. The case before us is a typical instance of the absurdity to which the interpretation followed in 19 Lah. 332¹ leads. Bhagwan Singh, father of the parties had executed a will on 31st August 1925 and got it registered on 2nd September 1925. By this will, he devised the whole of his property to the defendant. A part of the property has been found to be ancestral which, under custom by which he was governed, Bhagwan Singh had no authority to devise to one of his natural heirs to the exclusion of the other. Bhagwan Singh lived for ten years after the registration of the will. He died in 1935 and it has been found that it was sometime between 10th November 1935 and 30th January 1936 that the plaintiff first had knowledge of the execution of the will or its contents. If the word 'deed' as used in the schedule of Act 1 of 1920, is taken to be synonymous with 'document' and therefore includes a 'will', the plaintiff's suit instituted in 1937 to claim his inheritance or to contest the will would be long since time-barred, simply because he had not brought a declaratory suit within six years of the registration of the will, though during that period the testator was alive and could have revoked the will at his pleasure and though the plaintiff had no knowledge of its execution or con-

7. (1924) 1924 A. C. 185 : 93 L. J. P. C. 81 : 190 L. T. 518, Shannon Realities Ltd. v. St. Michel.

8. (1900) 1900 A. C. 323 : 69 L. J. P. C. 51 : 82 L. T. 433 : 16 T. L. R. 331, Simms v. Registrar of Probates.

tents. There is no reason to suppose that this was the intention of the Legislature, and yet this is the necessary consequence of reading the word 'deed' in the schedule as synonymous with 'document'. I agree that 19 Lah. 332¹ and the other cases, in which the same view was taken, were not correctly decided and that the law was rightly laid down in A.I.R. 1935 Lah. 313.⁶ The plaintiff-respondents' suit is therefore not barred by limitation so far as the claim relating to ancestral property is concerned.

BLACKER J. — I agree with the views expressed by my learned brothers Tek Chand and Dalip Singh, and concur in the answer to the reference which they propose to give.

G.N./R.K.

Answer accordingly.

C. P. C. —

(c) ('40) Chitaley, Pre. N. 7 Pts. 22 to 25.

A. I. R. (29) 1942 Lahore 118
SALE J.

Wasakha Singh through Kesar Singh,
Mukhtar-i-am — Defendant —
Appellant

v.

Mohammad Hussain, Plaintiff and
another, Defendant — Respondents.

Second Appeal No. 374 of 1941, Decided on 18th November 1941, from decree of Senior Sub-Judge, Gujranwala, D/- 18th December 1940.

Limitation Act (1908), Art. 10 — Sale of undivided share — Claim to pre-empt is governed by second part of Art. 10—Question of transfer of possession does not arise—Vendor executing sale deed in respect of occupancy rights in undivided holding—Sale deed registered — Subsequently vendor executing other sale deed in respect of proprietary rights in same land reciting that mention of occupancy rights in previous sale deed was through misconception and that parties had intended to sell proprietary rights—Limitation for suit for pre-emption held commenced from date of registration of second sale deed.

Since the sale of an undivided share of a joint holding does not admit of physical possession, the claim to pre-empt the sale must be governed by the second part of Art. 10, Limitation Act, the terminus a quo being the date of the registration of the instrument of sale. Consequently, the question of the transfer of possession does not arise in such a case and must be ignored. The reason why second part of Art. 10 lays down that the terminus a quo is the date of the registration of the instrument of sale is that the date of registration is the date on which the public must be presumed to know that the transfer has taken place. Consequently, the test for determining the terminus a quo for purposes of second part of Art. 10 is not the act of conveyance but the registration. [P 118 C 2; P 119 C 1]

On 16th March 1938, a deed reciting the sale of occupancy rights was executed and was registered on 18th March 1938. At the material time the vendor, who had been originally an occupancy tenant, had already acquired proprietary rights in the land; and it was realised that the recital of the sale of occupancy rights was wrong. Accordingly on 12th April 1938 another deed reciting the sale of undivided proprietary rights in the same land, was executed and duly registered. This deed further recited that the mention of occupancy rights in the deed of 16th March 1938 was made under a misconception, that the parties had intended to sell proprietary rights, and that the object of the deed of 12th April 1938 was to correct the mis-description and to substitute therefor the sale of proprietary rights.

Held that the registration of the deed of 16th March 1938 could not be presumed to inform any one interested, that a sale of the proprietary rights, had taken place. The necessary publicity could only be given by the registration of the actual deed of sale of proprietary rights, dated 12th April 1938; and from the point of view of publicity and notoriety it would be wholly immaterial that that deed was not the actual deed of conveyance but merely a deed correcting mis-description of the nature of the transaction mentioned in the earlier deed. Consequently, the terminus a quo for the suit for pre-emption was the second deed dated 12th April 1938. [P 119 C 1]

M. L. Puri — for Appellant.

Achhru Ram — for Respondent (Plaintiff).

JUDGMENT. — This is a second appeal from a judgment of the learned Senior Subordinate Judge of Gujranwala reversing the decision of the trial Court and granting the plaintiff a decree for possession by pre-emption of 2 kanals and 4½ marlas of land. The material facts are that on 16th March 1938 a deed reciting the sale of occupancy rights, of a 1/36th share in an undivided holding of 80 kanals and 8 marlas was executed in favour of the defendant-appellant-vendee. This deed was registered on 18th March 1938. It appears that at the material time the vendor, who had been originally an occupancy tenant, had already acquired proprietary rights in the land; and it was realised that the recital of the sale of occupancy rights was wrong. Accordingly on 12th April 1938 another deed reciting the sale of proprietary rights in the same land, was executed and duly registered. This deed further recited that the mention of occupancy rights in the deed of 16th March 1938 was made under a misconception, that the parties had intended to sell proprietary rights, and that the object of the deed of 12th April 1938 was to correct the mis-description and to substitute therefor the sale of proprietary rights. The present suit was instituted on 12th April 1939 and was resisted by the defendant-vendee on the ground that the suit was time-barred. He contended that the second deed of 12th April 1938 was not the sale deed which should afford the terminus a quo for the purposes of limitation in the present suit, since proprietary rights in the property had actually been sold by the first deed executed on 16th March 1938, which had been followed by the transfer of possession, and that time began to run from 16th March 1938. Since the suit had not been instituted within a year of 16th March 1938, it was, it is contended, time-barred.

Now it has been urged by Mr. Achhru Ram for the respondent—and the argument is accepted by Mr. Puri for the appellant—that since the sale of an undivided share of a joint holding does not admit of physical possession, this case must be deemed to be governed by the second part of Art. 10, Limitation Act, that is to say, that the terminus a quo is the date of the registration of the instrument of sale. It follows that the question of the transfer of possession which the lower Court has examined, does not arise in this case and must be ignored. The sole point therefore for decision in this second

appeal is whether the instrument of sale from the registration of which limitation runs, is the first deed of 16th March 1938, or the second deed of 12th April 1938. In the circumstances Mr. Puri admits that there is no necessity to consider his application for fresh evidence made under O. 41, R. 27, Civil P. C. In arguing that the suit is time-barred, Mr. Puri contends that the instrument of sale in this case should be deemed to be the first deed of 16th March 1938. He urges that although this deed recited the sale of occupancy rights, it was wrongly so recited but that this deed was in fact the instrument by which the sale of the proprietary rights was conveyed to the vendee, and that the second deed of 12th April 1938 was merely a correction of this mis-description and in fact conveyed nothing.

I agree with Mr. Achhru Ram that this argument is fallacious. It is immaterial whether the actual conveyance of the property in suit took place on 16th March 1938 or on 12th April 1938 since limitation under Art. 10 runs, not from the date of conveyance, but from the date of the registration of the instrument of sale. The reason why Art. 10, Limitation Act, lays down that the terminus a quo is the date of the registration of the instrument of sale (in cases where the subject of the sale does not admit of physical possession) is no doubt that the date of registration is the date on which the public must be presumed to know that the transfer had taken place. A reference to S. 30, Pre-emption Act, will show that the terminus date for the purposes of limitation, is the date on which publicity is given to the transaction, the object presumably being, to give persons interested an opportunity to know that a transaction has taken place which may give rise to a claim for pre-emption. Consequently, the test for purposes of limitation is not the act of conveyance but the registration of the instrument of sale. The registration of the deed of 16th March 1938 which conveyed the sale of occupancy rights could not be presumed to inform any one interested, that a sale of proprietary rights had taken place. The necessary publicity could only be given by the registration of the actual deed of sale of proprietary rights, dated 12th April 1938; and from the point of view of publicity and notoriety it would be wholly immaterial that this deed was not the actual deed of conveyance but merely a deed correcting a mis-description of the nature of the transaction mentioned in the earlier deed. I therefore, agree with Mr. Achhru Ram that the terminus a quo for the purposes of this case is the second deed dated 12th April 1938. It follows therefore that this suit is within time. No other point was argued in this second appeal which therefore fails and is dismissed with costs.

G.N./R.K.

*Appeal dismissed.***Limitation Act —**

(42) Chitaley, Art. 10, N. 6; N. 6 Pt. 2; N. 7 Pt. 6.
(38) Rustumji, Art. 10 Page 554 Pt. 1; Page 555 Pt. 5.

*** A. I. R. (29) 1942 Lahore 119****SALE J.*****Mt. Sharbati Devi—Appellant*****v.*****Kali Pershad—Respondent.***

Exn. First Appeal No. 46 of 1941, Decided on 12th November 1941, from order of Sub-Judge, First Class, Ferozepore, D/- 5th December 1940.

(a) Guardians and Wards Act (1890), S. 47 — Order passed in exercise of guardianship jurisdiction—Appeal is competent to High Court.

An appeal is competent to the High Court from an order of a subordinate Court passed in the exercise of its guardianship jurisdiction. [P 119 C 2]

(b) Guardians and Wards Act (1890), S. 47 — Application for appointment of guardian dismissed with costs—Order in execution of costs is appealable to High Court.

Where an application for the appointment of the guardian is dismissed with costs, an order passed in execution of the costs of such an application would be appealable to the same tribunal as would have jurisdiction in the original case, i. e., the High Court. [P 120 C 1]

* (c) Civil P. C. (1908), S. 151 and O. 21, R. 17—"Abuse of process of Court" in S. 151 — Act done as of right and in due course of law is not abuse of process of Court—Execution of decree for Rs. 44 — Property attached worth about Rs. 3000—Judgment-debtor not shown to have any other attachable property — There is no abuse of process of Court.

No act done or proceeding taken as of right and in due course of law, is an abuse of the process of the Court simply because such proceeding is likely to embarrass the other party. A person who brings himself within the terms of a statute is not to be deprived of a right conferred by that statute on 'so treacherous a ground of decision as an abuse of the process of the Court.' Nor is the failure to conform to a mere rule of practice, an abuse of process in every case; the Court must find in each case what exactly the abuse is. Therefore, where in execution of a decree for a paltry sum of Rs. 44, the decree-holder attaches the property of the judgment-debtor worth about Rs. 3000 as the judgment-debtor declined to pay and it is not shown that the judgment-debtor possesses any other property, it cannot be said that there is an abuse of the process of the Court. [P 120 C 2]

*Shamair Chand—*for Appellant.*A. N. Grover—*for Respondent.

JUDGMENT. — This is a first appeal from an order of the First Class Subordinate Judge, Ferozepore, holding that the action of a decree-holder in securing the attachment and sale of a house was an abuse of the process of the Court and directing him to pay to the judgment-debtor the sum of Rs. 257-8-0 on account of the loss caused to him by this action. A preliminary objection was taken on behalf of the respondent that no appeal lies to this Court, and that if the case is appealable at all, the appeal would lie to the Court of the District Judge. A recitation of the material facts will show that there is no force in this preliminary objection. These facts are correctly stated in the judgment of the trial Court and need not be here recapitulated at length. Suffice it to say, that the order of the lower Court was passed in the exercise of its guardianship jurisdiction under the Guardians and Wards Act. An application by the respondent Kali Pershad for appointment as guardian of the minor sons of the appellant Mt. Sharbati Devi had been dismissed with costs; and in pursuance of this order Kali Pershad had been directed to pay a sum of rupees 148-3-0 as costs to the appellant. On 24th October 1939, Mt. Sharbati Devi duly applied for execution by attachment of the property of the judgment-debtor, both moveable and immovable, and also by

his arrest. The judgment-debtor was reported to be living at Ambala, and the application so far as the arrest of the judgment-debtor and attachment of his moveable property is concerned was infructuous except in respect of a sum of Rs. 99-8-0 which had been deposited in another Court for Kali Prashad and which Mt. Sharbati Devi duly secured. This left a balance of approximately Rs. 44. The judgment-debtor refused to pay this small sum, and Mt. Sharbati Devi was compelled to proceed by coercive process for realization. She attached a house said to be worth Rs. 3800, mentioning in her application for attachment that though the sum to be realized was small, she was compelled to resort to this process owing to the contumacy of the judgment-debtor. Proceedings for the sale of this property continued in due course of law, and eventually on 12th July 1940 the shop was sold for Rs. 2725. It was only then that the judgment-debtor intervened to have the sale set aside by offering to deposit the amount due together with 5 per cent. of the sale proceeds. The judgment-debtor later also deposited the commission on the sale proceeds, due to the Government auctioneer and the sale was eventually set aside by the Court.

The present application was made by the judgment-debtor on 2nd August 1940 for recovery from Mt. Sharbati Devi of damages as compensation for the expense which the judgment-debtor had to undergo, over and above the actual decretal amount. The ground stated is that in order to injure the rights of the judgment-debtor, the decree-holder purposely and knowingly had attached a property considerably more in value than the decretal amount, and that the decree-holder's action was an abuse of the process of the Court. The trial Court has held that the action of the decree-holder did amount to abuse of the process of the Court and assessed the damages at Rs. 257-8-0. It is apparent from this recapitulation of the facts that an appeal is competent to this Court because the order of the subordinate Judge was passed in the exercise of its guardianship jurisdiction, in a matter arising out of a case falling under S. 47 (a), Guardians and Wards Act, for which an appeal is specifically provided to the High Court. The subordinate Judge had dismissed an application for the appointment of the guardian and in dismissing it had awarded costs against the applicant (now the respondent). On the analogy of S. 47, Civil P. C., an order passed in execution of the costs of such an application would also be appealable to the same Tribunal as would have jurisdiction in the original case, i.e., the High Court. I hold therefore that this appeal is entertainable by the High Court.

Turning now to the merits of the case, it is common ground that the only section under which the Court would have power to award damages is S. 151, Civil P. C., and then only, if there has been an abuse of the process of the Court. I am unable to see how there has been in this case any abuse of the process of the Court. The short point is that after the attachment by the decree-holder of a sum of Rs. 99-8-0 the amount due from the judgment-debtor was a paltry sum of Rs. 44 and all that the judgment-debtor had to do to avoid the subsequent trouble and expense to which he was put, was to pay this small sum. I have satisfied myself that the judgment-debtor knew very well at the time when the house was attached that the only amount he had to pay was Rs. 44 and that he deliberately and recalcitrantly refused to pay this

small sum, in order to harass decree-holder in executing the small balance of her decree. Proceedings for the sale of the house, went on for some months in due course of law, and the judgment-debtor, who though living at Ambala had been served from the beginning through his mukhtar at Ferozepore, could at any time have deposited the Rs. 44 in order to have the attachment on the house lifted. He did not do so. He compelled the decree-holder to go to the length of having the house sold; and it was only afterwards that his application was made to deposit the small balance of the decretal amount, so as to have the sale set aside.

No authority directly in point has been quoted by either side but in Chitaley's Code of Civil Procedure, Vol. I, under S. 151, Civil P. C., the learned author deals at some length in Note 6 on (p. 1220) with the meaning of the words "abuse of the process of the Court" in that section. After detailing the actions which might amount to such an abuse, none of which apply to the present case, the learned author cites authorities for the proposition that no act done or proceeding taken as of right and in due course of law, is an abuse of the process of the Court simply because such proceeding is likely to embarrass the other party. A person who brings himself within the terms of a statute is not to be deprived of a right conferred by that statute on 'so treacherous a ground of decision as an abuse of the process of the Court.' Nor is the failure to conform to a mere rule of practice, an abuse of process in every case; the Court must find in each case what exactly the abuse is. Now, in the present case, Mt. Sharbati Devi had a statutory right to take out execution in respect of the sum of Rs. 44 being the balance due from the judgment-debtor which the latter declined to pay. In so acting, there was no question of the decree-holder embarrassing the judgment-debtor, if anything, the shoe is on the other foot, i. e., it was the judgment-debtor who was embarrassing the decree-holder by refusing to deposit the paltry sum due.

The only argument that has been advanced in this case is that to O. 21, R. 17 there is a proviso to the effect that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree; and the lower Court seems to think that because in execution of a decree for Rs. 44, property worth about Rs. 3000 was attached, this constituted an abuse of the process of the Court. Now, in this case, the judgment-debtor was not living within the jurisdiction of the executing Court and it is not shown that he had any other attachable property, moveable or immovable, except the house in suit. He had deliberately refused to deposit the small balance of Rs. 44. In the circumstances, the natural course open to the decree-holder was to attach this property, and there was no abuse of the process of the Court in moving the Court to act accordingly. The judgment-debtor had plenty of time in the months intervening between the attachment and sale to have the attachment lifted, by depositing the small amount due but he refused to do so. In my opinion, there was no abuse of the process of the Court and no occasion therefore for the assessment of damages. I, therefore, accept the appeal and set aside the decision of the Subordinate Judge directing the decree-holder to pay damages to the judgment-debtor. The appellant Mt. Sharbati Devi is entitled to her costs in the proceedings starting with the application for damages made by Kali Pershad, the

judgment-debtor, on 2nd August 1940 and of the appeal in this Court.

K.S./R.K.

Appeal allowed.

C. P. C. —

(c) ('40) Chitaley, S. 151 N. 6 Pts. 18 to 20.

('41) Mulla, S. 151 Page 481 Note 'Prevent abuse of process of Court.'

A. I. R. (29) 1942 Lahore 121

SALE J.

*Dewan Chand and others — Debtors —
Petitioners*

v.

Daulat Ram — Creditor — Respondent.

Civil Revn. Petn. No. 169 of 1941, Decided on 2nd December 1941, for revision of order of Dist. Judge, Rawalpindi, D/- 20th December 1940.

(a) Hindu law—Joint family—Minor member cannot be adjudicated insolvent.

The minor co-parceners of a joint Hindu family cannot be adjudicated insolvent: ('37) 24 A. I. R. 1937 Pat. 665, *Rel. on.* [P 122 C 1]

(b) Hindu law—Joint family—Family business—Adult members adjudicated insolvent—Share of minor members is liable only if debt was for family business.

In an insolvency affecting the adult members of a joint Hindu family carrying on a family business, the liability of the share of the minor co-parceners in the joint family property depends upon whether the debt in question was borrowed for the joint family business: ('33) 20 A. I. R. 1933 Lah. 901, *Rel. on.* [P 122 C 1]

(c) Provincial Insolvency Act (1920), Ss. 6 (c) and 54—Fraudulent preference—Test—Onus—Transfers by debtor's authorized agent in favour of agent's relations held amounted to fraudulent preference.

The onus of proving that the alienations by the debtor constituted fraudulent preference under S. 6 (c) is on the party who impugns the transfer. The test for determining whether transfer constitutes fraudulent preference is to see what was the dominant motive of the debtors in satisfying the particular creditors. [P 122 C 1]

Three alienations of the property of the joint Hindu family firm were effected on the same day by its authorized agents who had been duly empowered to sell or mortgage the family property in order to liquidate its debts. All the three alienations were made in payment of debts due to relations of the agents and it was this fact that impelled the petitioning creditor to petition in insolvency shortly to prevent others such alienations.

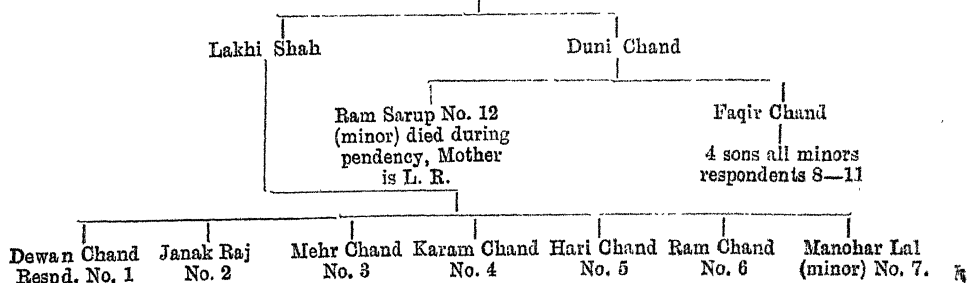
Held that the dominant motive for the transfers was to prefer the three creditors who were related to the agents of the joint family firm; and the transfers were fraudulent within the meaning of S. 54 because the three creditors were given preference over other creditors. [P 122 C 1]

Achhru Ram — for Petitioners.

A. N. Grover — for Respondent.

ORDER.—This is a petition for revision of an order of the learned district Judge of Rawalpindi affirming a judgment of the learned insolvency Judge, Rawalpindi, adjudicating the respondents insolvents on the petition of a creditor. The respondents in this case are members of a joint Hindu family who are the proprietors of a business under the name and style of Bhola Shah Lakhi Shah. The following pedigree-table will illustrate the relationship of the respondents:

BHOLA SHAH



It will be observed that of the respondents five are minors, viz., Manohar Lal, son of Lakhi Shah and the four sons of Faqir Chand. The material facts are that on 12th July 1932, the major members of the family together with the minors acting under the guardianship of their mothers executed a registered mukhtarnama appointing three persons Hari Chand, Ganpat Rai and Narain Das as their agents and authorising them to sell or mortgage the immovable family property in order to liquidate their debts. On 21st February 1934, these agents executed three deeds in favour of three creditors respectively, viz., Ex. P-1, a mortgage with possession of a house, Ex. P-2, a mortgage of a shop and Exhibit P-3, sale deed of a house property. Three weeks later, on 13th March 1934, Kesheo Das, another creditor, applied for the adjudication as insolvent

of all the respondents, including the minors, in their capacity as proprietors of the joint Hindu trading family firm Bhola Shah Lakhi Shah. The learned insolvency Judge adjudicated all these persons insolvents on 18th May 1940, and the decision has been confirmed in appeal on 20th December 1940. Arguments in appeal have been confined to two points: (1) Position of the minor respondents as affected by the order of adjudication, and (2) Whether there has been, as held by the Courts below, any act of insolvency on the part of the respondents.

As regards the minors the learned District Judge in appeal has pointed out in the last paragraph of his judgment that while the joint Hindu family can be adjudicated insolvent the order of adjudication does not affect the minor members. He goes on

to add that the share of the minor members can, however, be taken possession of by the receiver in insolvency. There is no doubt—and indeed Mr. Grover does not contest the point—that the minor coparceners of a joint Hindu family cannot be adjudicated insolvents (see 16 Pat. 7241). The question however, of the liability of the share of the minors in the joint family property in an insolvency affecting the adult members is a separate matter. The minors would not of course, have any personal liability nor would their property, other than their share in the joint family property, be liable. The liability of their share in the joint family property would depend on whether the debt in question was borrowed for the joint family business. The observation, therefore, of the learned District Judge that the share of the minor members can be taken possession of by the receiver in insolvency must be read subject to the qualification that the debt was in fact borrowed for the joint family business: (see a Division Bench authority of this Court, 15 Lah. 92). Whether the debt was in fact borrowed for the joint family business is a question which does not appear to have been investigated in this case and on which an expression of opinion at this stage might be premature.

Turning now to the question of whether acts of insolvency have been committed in this case the learned Judge has held that the three alienations, Exs. P-1, P-2 and P-3 are acts of insolvency because they amount to fraudulent preference under S. 6 (c), Provincial Insolvency Act, read with S. 54. These three alienations were effected on the same day, viz. 21st December 1934 by the authorized agents of the joint Hindu family firm who had been duly empowered to sell or mortgage the family property in order to liquidate their debts. It is significant that all three alienations were made in payment of debts due to relations (of the agents), and it was no doubt this fact that impelled the petitioning creditor to petition in insolvency shortly to prevent other such alienations.

It has been urged on behalf of the petitioner that the learned District Judge in holding that these alienations were acts of insolvency has overlooked the fact that the onus of proving that these alienations constituted fraudulent preference under cl. (c) of S. 6 is on the party who impugns the transfer. I agree with Mr. Achhru Ram that the onus is on the party impugning the transfer and that the test is to see what was the dominant motive of the debtors in satisfying these particular creditors. But even accepting this proposition of law, I am unable to hold that the decision of the learned District Judge is wrong. The dominant motive in the present case appears to have been to prefer the three creditors, who are related to the agents of the joint family firm; and the transfers were, in my opinion, fraudulent within the meaning of S. 54 of the Act because these three creditors were given this preference over other creditors. For this reason I do not interfere with the decision of the learned District Judge on this point. As regards the position of the minor respondents, I have indicated in my judgment that their share in the joint family property would only be liable in these insolvency proceedings if and when it is established that the debts were

borrowed for the joint family business. Subject to this observation the petition fails and is dismissed with costs.

G.N./R.E.

Order accordingly.

Hindu Law —

(a) ('40) Mulla, Page 312 Pt. (n).

(b) ('40) Mulla, Page 307 Pt. (s).

('38) Gour, Page 547 Pt. 1.

A. I. R. (29) 1942 Lahore 122

YOUNG C. J.

Faqr Chand — Petitioner

v.

Karam Chand Hiteshi — Respondent.

Criminal Revn. Case No. 2161 (Formerly Criminal Misc. No. 444) of 1941, Decided on 28th November 1941, against charge pending in Court of Magistrate, First Class, Lahore.

(a) Criminal P. C. (1898), S. 526—Apprehension in mind of accused.

The accused filed a written statement in which he made serious complaints against the Magistrate as well as disclosed prima facie, a good defence. The Magistrate filed the written statement without even reading it:

Held that there was sufficient ground for apprehension in the mind of the accused. [P 123 C 1]

(b) Criminal trial — Two similar complaints dismissed—Third complaint on same facts held should be quashed.

The fact that the petitioner has been harassed already by two similar complaints, both of which have been dismissed or he himself discharged, is ample ground for quashing a third complaint made on the same facts. [P 123 C 2]

(c) Criminal trial—Criminal Courts not to be used to collect civil debt.

Criminal Courts should not be used to collect a civil debt. Therefore a complaint filed in a criminal Court with the object of collecting a civil debt should be quashed. [P 123 C 2]

R.L. Anand and Puran Chand—for Petitioner.

Bhagwat Dayal — for Respondent.

ORDER. — This is a petition by one Faqr Chand for the transfer of a case from the Court of Lala Ganga Bishen, Magistrate, First Class. The charge against him is under S. 420, Penal Code, that is, for cheating. The history of this matter is astonishing. In 1927 one Allah Bakhsh sold certain land to Mt. Fazal Nishan. The title deed is Ex. P-E. In that title deed it is recorded that Allah Bakhsh is the owner in possession and that he transfers the ownership and possession to Mt. Fazal Nishan. On 25th March 1935 Mt. Fazal Nishan sold the same land by sale deed, Ex. P-D, to Faqr Chand, the petitioner before me today. In that sale deed it is recorded that Fazal Nishan, being the owner in possession of the land, transfers the same to Faqr Chand as owner in possession. On 6th January 1936 the petitioner Faqr Chand received a letter from the Deputy Commissioner, Lahore, recording that the mutation of this land had been entered in the name of Faqr Chand but the mutation had not been finally decided. On 11th March 1936 Faqr Chand having a marriage to perform mortgaged with the respondent complainant this land for Rs. 500. The mortgage deed again recited that Faqr Chand was the owner in possession of the

1. ('37) 24 A.I.R. 1937 Pat. 665 : 172 I.C. 737 : 16 Pat. 724 : 18 P.L.T. 839, Mahabir Prasad v. Ram Tabal Mandar.

2. ('38) 20 A. I. R. 1938 Lah. 201 : 149 I. C. 693 : 15 Lah. 9 : 36 P. L. R. 450, Mt. Champa v. Official Receiver, Karachi.

land. Nothing happened for three years; the petitioner received no notice that anything was wrong and no complaint was made to him by the mortgagee. On the other hand, the petitioner alleges that the complainant mortgagee, having to satisfy a decree against him asked the petitioner to repay the Rs. 500. This the petitioner was not in a position to do. On 18th February 1939 the respondent filed the information in this case against the petitioner accused. It was alleged that he had represented to the respondent that he was the owner in possession; that he was not the owner in possession, that the land was wakf and that Fazal Chand had never been in possession of it. The complaint was dismissed by Mr. Mukerji (then acting as Magistrate now a Sessions Judge) under S. 203, Criminal P. C., that is, that there was no ground for proceeding against the accused. On a revision petition to the Sessions Judge a further enquiry was ordered. The case then came before Chaudhri Kanwar Singh (then acting as Magistrate now a Sessions Judge) and he dismissed this complaint on 7th July 1939 in default of appearance by the respondent; he also stated in his order that there was no ground for proceeding. In spite of this, another complaint on 5th March 1940 was filed by the complainant, on the same facts as before, before a Magistrate of the first class. On 4th October 1940 the complainant's statement was recorded and one witness, his own advocate, was produced. The complainant was ordered to produce his witnesses next day, but on 5th October 1940 this new complaint was again dismissed in default in the absence of the complainant and the accused was discharged under S. 259, Criminal P. C.

On 11th October 1940 the present complaint was lodged, this being the third complaint lodged against this accused on precisely the same facts. Today is 28th November 1941 and this case is still unfinished in the Magistrate's Court. Various grounds have been submitted to me by the petitioner on the question of transfer. I do not need to particularize them: there is one, at any rate, which, to my mind, reasonably may occasion apprehension in the mind of the petitioner. As long ago as 31st March 1940, he filed a written statement in which he makes serious complaints against the learned Magistrate as well as discloses, what appears to be, *prima facie*, a good defence. The Magistrate filed the written statement without even reading it. This, the learned Magistrate admits. However I do not think it is necessary to transfer this case. The case for the prosecution is now closed. I have asked counsel, who appears for the respondent, to show me any evidence for the prosecution which would give any Court the slightest reason for finding the petitioner guilty of the offence with which he is charged. Counsel can point to no such evidence. He produced the evidence of one witness who says vaguely that about 5½ years ago he heard a conversation between the accused and some other man who claimed to be in possession of the land. This conversation was said to have been heard in the open air on some unspecified date and it seems impossible that this evidence could ever be accepted by anyone as of the slightest value. On the other hand, the complainant himself produced the jamabandi of 1938-39 in which the petitioner is entered as the owner and the complainant as the mortgagee and the patwari who was called by the complainant stated that the land was vacant.

In order to prove fraudulent misrepresentation, it would be necessary to show that in spite of the title deeds of this property recording the transfer from

Allah Bakhsh to Mt. Fazal Nishan and from Mt. Fazal Nishan to Fazal Chand, the petitioner knew that this land was in the possession of some one else; that the petitioner fraudulently represented in his mortgage deed that the land was in his possession knowing it was not. There is not a scintilla of evidence which would entitle any Court to come to any such conclusion. Apart from this ground, the fact that the petitioner has been harassed already by two similar complaints, both of which have been dismissed or he himself discharged, is a good ground for quashing a third complaint made on the same facts. There must be an end to proceedings of this kind. In addition it appears to me that this is a typical case of the criminal Courts being used to collect a civil debt. For all these reasons therefore in the exercise of my revisional jurisdiction under S. 439, Criminal P. C., I quash the proceedings in the Magistrate's Court and acquit the accused.

K.S./R.K.

Proceedings quashed.

Cr. P. C. —

(a) ('41) Chitaley, S. 526 N. 5.

('41) Mitra, S. 526 Page 1701 N. 1371 and Page 1705 N. 1372.

(b) ('41) Chitaley, S. 439 N. 26 Pt. 16; S. 403 N. 2 Pt. 4.

('41) Mitra, S. 439 Page 1432 Note 'Power to alter or reverse order or quash proceedings'; S. 403 Page 1289 N. 1097.

(c) ('41) Chitaley, S. 1 N. 1 Pt. 2.

A. I. R. (29) 1942 Lahore 123

SALE J.

Gokal Chand—Decree-holder—Appellant

v.

*Kishori Lal—Judgment-debtor—**Respondent.*

Exn. First Appeal No. 150 of 1941, Decided on 21st November 1941, from order of Senior Sub-Judge, Ambala, D/- 15th February 1941.

Civil P. C. (1908), S. 38 and O. 34, R. 4 — Power of executing Court—Mortgage decree — Sale of mortgaged property even though property is beyond jurisdiction can be ordered.—But Court has discretion in matter.

An executing Court has power to order the sale of mortgaged property even though the property is situated beyond the limits of its jurisdiction. The Court has however a discretion to decline to do so on the score of convenience : ('33) 20 A. I. R. 1933 Lah. 687 and 22 Cal. 871, *Rel. on.* [P 124 C 1]

*Shamair Chand — for Appellant.**Roop Chand — for Respondent.*

JUDGMENT.—This is an execution first appeal from an order of the learned Senior Subordinate Judge of Ambala passed in execution of a mortgage decree for Rs. 17,500. The decree-holder had applied for sale of the mortgaged property which was situated partly in Ambala district and partly in Chakrota (Dehra Dun District). The learned Senior Subordinate Judge declined jurisdiction to sell the Chakrota property as being outside the jurisdiction of the Court. It is urged in appeal that this refusal is contrary to the provisions of S. 38, Civil P. C. The Rules given by Mulla in his Civil Procedure Code relative to S. 38, indicate that while territorial jurisdiction is normally a condition precedent to a Court executing a decree, there is an exception in the case of execution of a mortgage decree under

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O. 34, R. 4, whereby the Court which passes the decree, may execute it even though the property is situated beyond the local limits of its jurisdiction. As held by Broadway J. in A.I.R. 1933 Lah. 687,¹ this point is concluded by authority; and indeed Mr. Rup Chand on behalf of the respondent, does not question the view that it is settled law that an executing Court has power to order the sale of mortgaged property even though the property is situated beyond the limits of its jurisdiction.

Mr. Roop Chand's argument is confined to the point that though the Senior Subordinate Judge undoubtedly has jurisdiction to sell the Chakrota property, the Court has a discretion to decline to do so on the score of convenience. This argument I accept. As stated in 22 Cal. 871² (at p. 875) the decision should not "be understood as holding that the executing Court is alone competent to hold the sale in execution of a decree, for, in many cases, it would no doubt be more convenient and proper that the sales of various lots of immovable properties mortgaged should be held in districts in which they are situated." But this is an aspect of the case which the Senior Subordinate Judge has not considered. In accepting this appeal, I have to point out that the learned Senior Subordinate Judge has full jurisdiction to sell the Chakrota property; but it will be for him to decide after hearing the parties, whether on the score of convenience, he should, or should not exercise this jurisdiction. The Senior Subordinate Judge will have full discretion to decline to do so, if he thinks it will be inconvenient for the Court to deal with the Chakrota property. I make no order as to costs.

K.S./R.K.

Appeal allowed.

1. ('33) 20 A. I. R. 1933 Lah. 687 : 143 I. C. 574 : 14 Lah. 457 : 34 P.L.R. 815, Girdhari Lal v. Pars Ram.

2. ('95) 22 Cal. 871, Jagernath Sahai v. Dip Rani Koer.

C. P. C. —

('40) Chitaley, S. 38, N. 6 Pts. 3 and 4; S. 39, N. 8 Pt. 2.

('41) Mulla, S. 38 Page 162 Pt. (m); S. 39 Page 167 Pt. (j).

* A. I. R. (29) 1942 Lahore 124

DALIP SINGH and DIN MOHAMMAD JJ.

Mahant Saya Ram Das Potra Chela of Mahant Charan Dass — Plaintiff — Appellant

v.

Lahore Electric Supply Co., Ltd. —

Defendant — Respondent.

Second Appeal No. 629 of 1939, Decided on 17th November 1941; case referred to Division Bench by Abdul Rashid J., D/- 11th October 1940.

* Limitation Act (1908), S. 26 (2)—'Belongs'—Meaning of—Servient tenement being transferee from Crown—60 years' rule does not apply.

The word 'belongs' in S. 26 (2) should be given its plain meaning or should not be interpreted by a forced construction as equivalent to 'has belonged.' Therefore where an easement is claimed over some property in the hands of a transferee from the Crown, the right would be acquired against the transferee to whom the property belongs by the expiry of a period of 20 years within two years next before the suit brought. The 60 years' rule

does not apply : ('18) 5 A. I. R. 1918 Mad. 120, *Commented upon* ; ('29) 16 A. I. R. 1929 All. 382 and 1904 A. C. 179, *Rel. on* ; (1891) 1 Ch. 658, *Distig.* [P 125 C 1, 2]

M. C. Mahajan and Khan Chand —

for Appellant.

Jagan Nath Aggarwal — for Respondent.

ORDER OF REFERENCE TO DIVISION BENCH

ADDUL RASHID J.—An easement, where the servient tenement is owned by a private individual, can be acquired by an enjoyment as of right without interruption for a period of 20 years. Where, however, the servient tenement belongs to Government, no easement can be acquired unless the right to light, air or water has been enjoyed without interruption for a period of 60 years. In the present case, the servient tenement belonged to Government from 1856 to 1936. Thereafter, the servient tenement was purchased by the Lahore Electric Supply Company Limited. The learned District Judge has held that the temple has enjoyed an easement as of right for a period exceeding 20 years. It has, however, been found by the lower Court that the temple has failed to establish the enjoyment of an easement for a period of 60 years. Mr. Mehr Chand Mahajan contends that the words 'belongs to Government' in sub-s. (2) of S. 26, Limitation Act, and similar words in the Easements Act, mean that the servient tenement, at the time of the institution of the suit, should belong to Government and that if that is so, the plaintiff will have to prove user for a period of 60 years to make his right absolute and indefeasible. If, however, at the time of the institution of the suit, the servient tenement has passed from the hands of the Government to a private individual and the plaintiff has enjoyed the easement for a period of 20 years before the institution of the suit, his right to the easement has become absolute and indefeasible and cannot be defeated by pleading that as the Government was the previous owner the easement could not be acquired by user for a period of 20 years only.

It was held in 41 Mad. 622¹ that the words 'belongs to Government' in the last paragraph of S. 15, Easements Act, must refer not to the time of suit but to the time during which the easement is enjoyed. A contrary view was taken by a Single Judge of the Allahabad High Court in 116 I. C. 806.² The two rulings referred to above do not contain any reasoning in justification of the conclusions arrived at. The present case is an important one : and I am told by the learned counsel that the unsuccessful party is bound to file an appeal under the Letters Patent. As this appeal raises an important question of law, it is desirable that it should be authoritatively decided by a Division Bench. Subject to the orders of the learned Chief Justice, I refer this case to a Division Bench for disposal.

JUDGMENT OF DIVISION BENCH

DALIP SINGH J. — The plaintiff brought a suit against the Lahore Electric Supply Company, Limited, for an injunction restraining them from closing a drain which conveys the plaintiff's water through the defendants' land on to a municipal drain. He claimed an easement by prescription of

1. ('18) 5 A. I. R. 1918 Mad. 120 : 45 I. C. 98 : 34 M. L. J. 896 : 41 Mad. 622, Srinivasa Upadya v. Ranganna Bhatta.

2. ('29) 16 A. I. R. 1929 All. 382 : 116 I. C. 806, Municipal Board, Pilibhit v. Khalil-ul-Rahman.

It appears that previous to the Supply Company becoming the land was owned by Government which the Company on 28th April 1936. The trial Court that no user of 60 years had been proved. The learned Judge dismissed the appeal. The matter before a learned Judge in Single Bench referred the case to a Division Bench that a difficult question of law was

presented there are two conflicting views. In 41 Mad. 622,¹ where a Division Bench of the Madras High Court appeared to hold in the case of the Crown owning some land and selling it to a private party, that the limitation for acquiring prescription was 60 years and that the plaintiff could not bring a suit against the transferee the land which he had been enjoying the easement of the Crown or the Government. In such a case to acquire an easement against such a plaintiff would have to prove 60 years against the Government or 20 years against the transferee. The learned Judge somewhat — if I may say so with all respect to the argument which is in contradiction to the argument which is put forward that if the period of 58 or 59 years, then the plaintiff would be entitled to the period in the hands of the transferee. Looking at the matter appears, as I have all respect to the learned Judges, to be correct. There can be no question of a period of 60 years or small to the period of 20 years against the transferee, if the decision of the Madras High Court were

In this ruling, there is a ruling of the Madras High Court reported in 116 I.C. 806,² in which it was held that in the hands of the Government the period during which the land was in the hands of the Government could be taken up the full period of 20 years to acquire an easement against the transferee. In A. C. 170³ at p. 189, the House of Lords held that an easement is acquired by prescription if brought and 20 years prior user is proved. Thus, an easement differs from other rights in that the mere exercise does not create an easement. It is the exercise which turns the right into an indefeasible right. It would follow therefore that on the construction of the statute the right would be in the hands of the transferee to whom the property expires of a period of 20 years next before the suit brought. It is, however, following the commentary in the report at page 218 that this view creates a difficulty inasmuch as it would imply that an easement which had been acquired against the Crown is by transfer immediately acquired as against him. The correct view would be to interpret "belongs" in S. 26, Limitation Act as "belongs longed." I do not see how this view in language of the section is necessary. Whatever principles might apply in

A.C. 179 : 73 L.J.Ch. 484 : 90 L.T. 30 : 20 T. L. R. 475, Colls v. Home

England as regards derogation from Crown grants, etc. etc., I do not see how when the statute has specifically named the Crown and prescribed the period of limitation against the same, another portion of the section, equally plain, should be differently interpreted by reason of some principles as to statutes not derogating from the Crown's rights, or that statutes should be interpreted not to derogate from the Crown's rights. The statute as I understand it, simply has given an extended period over a right to be acquired against the Crown. It has not provided for transferees from the Crown enjoying the same extended right. Nor has it laid down that no easement can be acquired against the Crown, nor that during the period of 60 years there can be no process of acquiring an easement against the Crown. This not being so, I fail to see what derogation of the Crown's rights or privileges is achieved by holding that the transferee from the Crown merely holds the land just as an ordinary individual would hold it subject to the rights of easement which have been acquired against that property by other subjects if they have complied with the statutory requirements. If it be contended that the Crown would not be able to sell property at the full value that it has in the Crown's hands, it may be answered (1) that the statute has made no such exception and (2) that property acquired by the Crown similarly will not be subject to an easement though an easement might, if a suit had been brought, have been claimed against the prior owner. Thus, if the Crown loses in one direction by this interpretation of the statute, the Crown gains in another. Hence, I see no reason why the word "belongs" should not be given its plain meaning or be interpreted by a forced construction as equivalent to "has belonged."

I would therefore, accept this appeal and decree the plaintiff's suit. In the circumstances of the case, as there were conflicting decisions on the point, I would leave the parties to bear their own costs throughout. I may add that an English case, (1891) 1 Ch. 658,⁴ was relied upon by the learned counsel for the respondent; but that case proceeded on the short point that in the English Act S. 3 which was applicable to light did not mention the Crown and therefore no easement nor any process of acquiring an easement could proceed against the Crown in the matter of an easement of light. That case therefore has no bearing on the question in India.

DIN MOHAMMAD J. — I agree.

K.S./R.K.

Appeal allowed.

4. (1891) 1 Ch. 658 : 60 L. J. Ch. 345 : 64 L. T. 438 : 39 W. R. 602, Perry v. Eames.

Limitation Act —

(42) Chitaley, S. 26, N. 16 Pts. 4 and 5.

(38) Rustomji, S. 26, Page 510 Note 'Easement against Government.'

* A. I. R. (29) 1942 Lahore 125

YOUNG C. J. AND BECKETT J.

Bal Mokand — Petitioner

v.

Emperor.

Criminal Revn. Petn. No. 741 of 1941, Decided on 29th October 1941; case referred to Division Bench by Tek Chand J., D/- 17th July 1941.

(a) Motor Vehicles Act (1939), S. 123 (1) — Lorry owned by two persons — One of them

convicted and fined — Fining other, though not illegal is undesirable.

Where a lorry is owned by two persons in partnership, each of them is the owner of the lorry and each of them would be liable under the strict wording of S. 123 (1) for the illegal act, and therefore it cannot be said that when one of them has been convicted and fined the other cannot be fined. But in such cases it is undesirable to exact a fine from all the owners separately. [P 126 C 1]

“(b) Motor Vehicles Act (1939), Ss. 22 (1) and 42 (1)—Lorry out on particular day contrary to provisions of Act—Only one offence is committed—Stopping lorry at several places and charging owner for several offences is not proper.

If a lorry is out on one day contrary to the provisions of the Act, it cannot be stopped at several places of its journey and the owner charged for any number of separate offences. The offence is using the lorry on the particular day and therefore there is only one offence. Framing several charges in such a case is improper. [P 126 C 2]

“(c) Motor Vehicles Act (1939), Ss. 112, 123—Subsequent offence—Accused should have committed same offence with knowledge of previous conviction.

Where a man is charged with failing to get a permit from the Regional and Provincial Transport Authority, it is inequitable to exact the enhanced fine unless he has suffered a first conviction and after that conviction he has again offended. Hence where he is charged in several cases at one and the same time and convicted, he has not with knowledge of a conviction committed again the same offence. [P 126 C 2]

Roop Chand — for Petitioner.

R. C. Soni for Advocate-General —
for the Crown.

YOUNG C. J.—These are petitions for revision submitted to this Court by the Sessions Judge, Shahpur, and ordered to be placed before a Division Bench by the learned Single Judge who originally heard them. The facts are that Balmokand was charged under Ss. 22 (1) and 42 (1), Motor Vehicles Act. He was convicted under S. 112 read with S. 22 (1) and S. 123 (1) read with S. 42 (1) of the said Act. He was fined Rs. 10 for each of these offences. With regard to this conviction, the point taken by the applicant is that he is the co-owner of a lorry which was being used without registration and without a permit by the Regional and Provincial Transport Authority. The co-owner a certain Diwan Chand had already been convicted under the same sections and fined. It is argued by this applicant that his co-owner having already been convicted and fined he could not be fined for the same offence. This point may be quite briefly dealt with. Under S. 123 (1) it is enacted that “whoever causes . . . or allows a motor vehicle to be used . . . in contravention of the provisions of sub-s. (1) of S. 42 . . .” This being a partnership of two persons, each of them is the owner of the lorry and each of them would be liable under the strict wording of the section for the illegal act, and therefore it cannot be said that the point taken by the applicant is sound. We however think that in these circumstances in the case of a lorry which is owned by two or more persons it is undesirable to exact a fine from all the owners separately. If the lorry had been owned by one man the fine would have been the same amount. We therefore think in this case

that the fine on Balmokand with regard to case No. 206 should be remitted and we recommend accordingly.

The second point raised in cases Nos. 207 and 208 is that both these offences (similar in character and offence to case No. 206) were committed on the same day. The lorry was going to a certain village and back again. It was seen at two places and therefore two charges were made. This appears to us to be improper. It seems obvious that if a lorry is out on one day contrary to the provisions of the Act it might be stopped at every yard of its journey and the owner charged for any number of separate offences. The offence in our opinion is using the lorry on the particular day and therefore in cases Nos. 207 and 208 there is only one offence and not two. The conviction on the second case (208) is therefore set aside and the fine will be returned (if paid) to the applicant. The third point taken is that in cases Nos. 207 and 208 as they were “subsequent offences” the enhanced fine of Rs. 100 was inflicted. Under S. 112 of the Act it is enacted . . . if having been previously convicted of any offence under this Act . . . he is again convicted of an offence under this Act he shall be punishable with fine which may extend to one hundred rupees. The applicant having already been convicted in case No. 206 there is no doubt that he comes within the provisions of Ss. 112 and 123 in that he has again been convicted of two offences. We think however that in a case where a man is charged as here with failing to get a permit from the Regional and Provincial Transport Authority, it is inequitable to exact the enhanced fine unless he has suffered a first conviction and after that conviction he has again offended. In this case, he was charged in all these cases at one and the same time. The applicant had not with knowledge of a conviction committed again the same offence. Although as we have pointed out, on a strict wording of Ss. 112 and 123 it is permissible to fine him Rs. 100, under the circumstances of this case we recommend that the fines in case No. 207 should be remitted.

K.S./R.K.

Order accordingly.

A. I. R. (29) 1942 Lahore 126

TEK CHAND AND BLACKER JJ.

Karam Dad — Judgment-debtor —
Appellant

v.

Ram Asra Mal, auction-purchaser and
another, Decree-holder — Respondents. 16

Exn. Second Appeal No. 1765 of 1940, Decided on 19th December 1941; case referred to Division Bench by Beckett J., D/- 10th June 1941.

(a) Civil P. C. (1908), S. 51—Land not liable to attachment or sale — Still receiver can be appointed.

A receiver can be appointed under S. 51, Civil P. C., to liquidate a decree from the profits of the land by granting a lease, although the interest in the land of the judgment-debtor cannot be attached or sold by reason of S. 18 of Punjab Colonization of Government Lands Act : (‘37) 24 A.I.R. 1937 Lah. 798 and (‘38) 25 A.I.R. 1938 Lah. 458, *Foll.*

[P 128 C 1]

(b) Punjab Debtors Protection (Amendment) Act (9 of 1938), S. 3 — Scope — Receiver appointed before Act came into force executing

lease of property which was then valid to liquidate debt — Though appointment of receiver terminates under S. 3, acts done by him are not invalidated so as to affect vested rights — Hence lease granted by him does not automatically terminate under S. 3: Exn. S. A. No. 1256 of 1940 and Exn. S. A. No. 75 of 1940, **OVERRULED**.

Retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in a language which is fairly capable of either interpretation, it ought to be construed as prospective only. Unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language, an Act should not be so construed because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment. [P 128 C 2 ; P 129 C 1]

Therefore where a receiver appointed before the Act 9 of 1938 came into force has executed a lease of property which was then valid to liquidate a debt of the judgment-debtor, the lease granted by him cannot be made to terminate automatically under S. 3 of the Act 9 of 1938. For, the intention of the Legislature in enacting S. 3 as gathered from the language employed, is to prohibit, for the future, the appointment of receivers for any of the purposes mentioned in the section and to terminate on a certain date all appointments already made; but not to invalidate transaction validly entered into by them with third parties so as to affect vested rights: Exn. S. A. No. 75 of 1940 and Exn. S. A. No. 1256 of 1940, **OVERRULED**. [P 129 C 1]

(c) Civil P. C. (1908), O. 40, R. 1 (d) and S. 51 — Lease auctioned by receiver subject to sanction of Court — Court allowing lease money to be paid to decree-holder — Sanction is implied.

Where the receiver appointed by the executing Court auctions a lease subject to the sanction of the Court, the Court must be taken to have sanctioned the lease if it allows the lease money to be paid to the decree-holder. [P 128 C 2]

Mahmud Ali — for Appellant.

Kundan Lal — for Respondent 1.

ORDER OF REFERENCE TO DIVISION BENCH

BECKETT J. — This case raises a question as to the validity of arrangements made by receivers in execution proceedings for leasing out Crown tenancies in the colony districts, now that the appointment of such receivers have been terminated under S. 3, Punjab Debtors' Protection (Amendment) Act, 1938. I have been asked to refer this appeal for decision by a Division Bench, on the ground that there are some hundreds of similar cases now pending in the outlying Courts, and the course of further proceedings needs to be settled by authoritative decision. An appeal raising a question of this kind came up for decision before *Din Mohammad J.* in Execution Second Appeal No. 75 of 1940. After remarking that no direct authority on the point had been cited before him, he held that the tenure of a lessee came to an end with the appointment of the receiver and added that there seemed to be much force in the contention that the object of the new legislation would be defeated otherwise. This decision was followed by *Blacker J.* in Execution Second Appeal No. 1256 of 1940.

The only relevant decision which I have been able to find is 15 Cal. 253¹ In that case the receiver had entered into an agreement to lease, but the details were settled in the High Court. The appointment of the receiver came to an end before a proper conveyance had been executed. It was held that the Court had power to complete the transaction, although the appointment of the receiver had come to an end and the property had gone back to one of the parties.

The case decided by *Din Mohammad J.* is distinguishable, inasmuch as in that case the lease had actually been granted and had been confirmed by the Court, whereas in the present case the receiver had merely made arrangements for a lease subject to the sanction of the Court, which had not yet been formally granted. If it is to be held, however, that an existing lease would now be terminated, no question of confirming the lease could arise. On the other hand, if it is otherwise held, questions would arise as to whether the arrangements were in fact confirmed by the acceptance of the lease money and the payment of it to the decree-holder, and whether the lease could now be confirmed. As the same question of principle is to some extent involved and an authoritative pronouncement is required, I refer the appeal to a Division Bench, subject to the orders of the Hon'ble the Chief Justice. In view of a large number of pending cases which will turn on this appeal a very early date might be arranged.

JUDGMENT OF DIVISION BENCH

TEK CHAND J. — The facts of the case which have given rise to this second appeal are as follows: The appellant holds two squares of land under Government on a horse-breeding tenure under the Colonisation of Government Lands Act, 5 of 1912. In execution of a money decree obtained by respondent 2 against the appellant, the executing Court passed an order appointing the Official Receiver, Sargodha, as receiver to take possession of one of these squares and collect the rents and profits, if necessary by leasing it for a period not exceeding seven years. On 5th December 1938, the Official Receiver auctioned the lease for seven years and accepted the highest bid of Ram Asra Mal respondent 1 for Rs. 994. At the conclusion of the auction the auction-purchaser paid one-fourth of the lease money and he deposited the balance on 19th December 1938. On 4th March 1939, the receiver intimated to the Court that the auction had taken place and the lease had been given to respondent 1 subject to the sanction of the Court. On 19th June 1939, the lease money (after deduction of the expenses of the auction) was paid to the decree-holder. On 20th June 1939 the auction-purchaser applied to the Court for being put in possession of the square which had been leased to him. A warrant for delivery of possession was, accordingly, issued to the Collector. The Collector however returned the warrant pointing out that in view of Ss. 2 and 3 of Punjab Act 9 of 1938 (which had come into force on 12th January 1939) the lease was invalid and possession could not be delivered. On the return of the warrant to the executing Court, the judgment-debtor repeated the same objection and he further urged that the lease in favour of respondent 1 had not been formally sanctioned by the Court and for this reason also the lease was invalid. The Senior Subordinate Judge upheld both these objections and rejected the auction-purchaser's application for delivery of possession. On appeal by the

1. ('88) 15 Cal. 253, Surendro Keshub Roy v. Doorgasoondery Dossee.

auction-purchaser, the District Judge reversed both these findings and returned the case to the executing Court for proceeding in accordance with law.

The judgment-debtor preferred a second appeal, which came up for hearing before Beckett J. sitting in Single Bench. Before him, the same objections were repeated and in support of the view taken by the Collector and the Senior Subordinate Judge two unpublished decisions in Execution Second Appeal No. 75 of 1940 and Execution Second Appeal No. 1256 of 1940 were cited. In view of these decisions and having regard to the importance of the question of law involved the learned Judge has referred the case to a Division Bench. Before dealing with the question of law, it is necessary to notice certain subsidiary matters which were raised before us by Mr. Mahmud Ali on behalf of the appellant. He contended that the receiver had exceeded his authority in leasing the land to respondent 1, as the order appointing him merely authorised him to collect the rents and profits of the square in question and not to effect a lease. This plea does not appear to have been raised in the Courts below and I have no doubt that it is without any substance. The learned counsel referred us to the order of 15th November 1938, some words in which are not clearly legible. The matter is however put beyond doubt by the rokhar issued by the executing Court to the receiver on 16th November 1938, which has been produced in original before us and the statement of the Official Receiver whom we have examined. In the rokhar which was issued in pursuance of the order of 15th November, it was clearly stated that the receiver was authorised to lease one square of land held by the judgment-debtor appellant for a period not exceeding seven years.

The learned counsel next urged that as the land was held by the judgment-debtor under Government on a horse-breeding tenure and as S. 18, Colonisation of Government Lands Act, 1912, expressly laid down that none of the rights or interests vested in the appellant could be attached or sold in execution of a decree or order of any Court, it was not competent to the executing Court to appoint a receiver to lease it. This identical objection was raised in A. I. R. 1937 Lah. 788² and was rejected by Coldstream J. who held that, under the law then in force, a receiver could be appointed to recover the income of such land for seven years which was the period for which the tenant himself could lease the land. This decision was approved in A. I. R. 1938 Lah. 458,³ where Addison and Din Mohammad JJ. held that a receiver could be appointed under S. 51, Civil P. C., to liquidate a decree from the profits of the land by granting a lease, although the interest in the land of the judgment-debtor could not be attached or sold by reason of S. 18 of Act 5 of 1912. Mr. Mahmud Ali has questioned the soundness of these rulings but he was not able to put forward any cogent reasons in support of his contention. These decisions have my respectful concurrence and, following them, I hold that under the law in force in November and December 1938 the executing Court could appoint a receiver to lease the judgment-debtor's land. The third point urged was that in this case the lease was auctioned by the receiver subject to the sanction of the executing Court but no sanction had actually been obtained and therefore the lease was invalid. As pointed out by the

learned District Judge no direction had been given by the executing Court to the receiver in its order of 15th November 1938 (or in the rokhar of 16th November 1938) that the lease was to be subject to his sanction. In any case, the Court by allowing the lease money to be paid to the decree-holder must be taken to have sanctioned the lease, if its sanction was at all necessary.

The main contention of the appellant however is that assuming that the lease was validly granted according to the law which was in force at the time, it automatically terminated on the expiry of six months from the date on which Act 9 of 1938 came into force (12th January 1939). Section 2 of that Act enacts that notwithstanding anything contained in the Code of Civil Procedure no decree for the payment of money shall be executed by the sale without attachment, or by the appointment of a receiver of land, or the produce of land, or any interest in land, which under any law for the time being in force is exempt from attachment or sale. Section 3 of the Act lays down that if any Court has appointed a receiver of property of which a receiver could not be appointed after the provisions of this Act came into force, such appointment shall terminate on the expiry of six months from the date on which this Act came into force unless terminated earlier by the Court which made the appointment.

It would be seen that S. 2 prohibits the appointment of a receiver, in circumstances mentioned in it after 12th January 1939. This section is obviously inapplicable to the present case as here the receiver had been appointed on 15th November 1938, nearly two months before the Act came into force. The appellant relies mainly on S. 3 which lays down that receivers, who had already been appointed before 12th January 1939, would be functus officio on the expiry of six months from that date, i. e., on 12th July 1939; but it does not say that acts already done, or transactions completed, by the receiver in the course of his appointment and within the scope of his authority would be invalidated forthwith or become inoperative from the date on which the receiver's authority is to cease. There is no provision to this effect in the Act and in the absence of a clear and unequivocal expression to the contrary the Act cannot be interpreted so as to affect vested rights. It is a well-established rule of construction of Statutes that "retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in a language which is fairly capable of either interpretation, it ought to be construed as prospective only." (Maxwell on Interpretation of Statutes, 8th Ed., p. 189). It is equally well-settled that in construing a section, which is to a certain extent retrospective, "larger retrospective effect is not to be given than that which, it can be seen, the Legislature plainly meant." (Beal on Cardinal Rules of Legal Interpretation, 3rd Ed., p. 468). The Punjab Legislature has recently passed some Acts in which vested rights have been affected (e. g., the Punjab Restitution of Mortgages Act, 4 of 1938); but in those Acts it has given effect to its intention in plain and unambiguous words. In Act 9 of 1938, however, there is not a single word which indicates that it was the intention of the Legislature not only to terminate the appointments of the receivers already appointed, but also to invalidate transactions which had been validly entered into by a receiver during the period of his appointment.

2. (37) 24 A. I. R. 1937 Lah. 788 : 175 I. C. 601 : 39 P. L. R. 649, Gopal Das v. Devi Das.

3. (38) 25 A. I. R. 1938 Lah. 458 : 177 I. C. 410 : 40 P. L. R. 303, Mohammad Sharif v. Mrs. Boughton.

The contrary view expressed in the unpublished Single Bench decision, Execution Second Appeal No. 75 of 1940, cannot, if I may say so with the utmost respect, be supported on any of the grounds on which it proceeded. It was observed that "if unauthorised acts done by the receiver are countenanced for a period beyond his own life, the object with which the new section was enacted will be defeated." With the greatest deference, I venture to think, that this observation is based on erroneous premises. In the first place the act of the receiver was not unauthorised at the time when it was done. He had been appointed for the purpose of leasing the land and he had granted the lease before the new Act came into force. His act was therefore within the scope of his authority on that date. Secondly, the intention of the Legislature in enacting Sec. 3, as gathered from the language employed, was to prohibit, for the future, the appointment of receivers for any of the purposes mentioned in the section and to terminate on a certain date all appointments already made; but not to invalidate transactions validly entered into by them with third parties. As remarked by their Lordships of the Privy Council in 1898 A. C. 469¹ at p. 476 "unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language, an Act should not be so construed because it manifestly shocks our sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment."

The other reason for the invalidity of the lease given in Execution Second Appeal No. 75 of 1940 is based on a remark in Kerr on Receivers (10th Ed.) p. 238, that "a receiver has no power by a lease, made in his own name, to transfer the legal estate in the property, nor can such a power be given to him by a Judge." This sentence occurs in a paragraph in which the learned author has summarised the practice of the Courts of England relating to the appointment of receivers of real or leasehold estate and refers to cases where a receiver has been appointed in respect of property in which one person has the "legal estate" and the other the "equitable estate." These expressions had different meanings at different times in English legal history which it is not necessary to set out in detail here. It will suffice to say that in the Law of Property Act, 1925, (15 Geo. V, c. 20), "legal estate" has been given a much restricted meaning. The only estates now recognized as "legal estates" are those enumerated in sub-s. (2) of S. 1 of that Act and it is laid down in sub-s. 3 that all other estates, interests or charges in or over land take effect as "equitable interests."

In the passage cited from Kerr on Receivers the expression "owner of the legal estate" is used in this technical sense and the learned author is, apparently, referring to a case in which a receiver had been appointed in an action, to which the owner of the "legal estate" was not a party. This appears clear from foot-note (1) at p. 239, which qualifies the quotation as follows: "though he (receiver) may be authorized to execute in the name of the estate owner, if a party." But be that as it may, these technical rules of English law, dealing with peculiar tenures of property, and having their origin in the practice prevailing at a time when law was administered by Courts of ordinary jurisdiction while equitable relief was granted by the Court of Chancery, are not applicable to cases like

the present, in this country. Here, the law bearing on the subject is laid down in S. 51 and O. 40, R. 1, Civil P. C. By sub-r. (d) of R. 1, the Court can, inter alia, "confer upon the receiver all such powers, as to . . . the collection of rents and profits . . . and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit." As has been stated above, the judgment-debtor himself could, under S. 130 of Act 5 of 1912, lease the land for seven years, and it was competent to the Court to authorise the receiver to lease it for the same period. This was the law before Act 9 of 1938 came into force and a lease granted by a receiver, under authority given to him by the Court, before Act 9 of 1938 came into force, was valid, and it was not rendered inoperative by that Act. The second case, Execution Second Appeal No. 1256 of 1940, was heard ex parte by my learned brother Blacker J. sitting in Single Bench and the learned Judge based his decision upon Execution Second Appeal No. 75 of 1940 which had been decided a short time before. For the foregoing reasons, I would affirm the decision of the learned District Judge and dismiss this appeal, but, in the circumstances, would leave the parties to bear their own costs throughout.

BLACKER J. — I agree throughout with the conclusions reached by my learned brother. I think, however, that I may point out that the case to which reference has been made above, in which I held a contrary view on the main point, was heard by me ex parte. I have now had the advantage of hearing the question argued from both points of view, and in consequence I am of opinion that the position taken up by me then was erroneous. I concur in the orders which my learned brother proposes to pass.

K.S./R.K.

Appeal dismissed.

C. P. C. —

(a) ('40) Chitaley, S. 51, N. 6 Pt. 4a; O. 10 R. 1, N. 21a Pt. 1.

('41) Mulla, S. 51 Page 217 Pt. (c).

(c) ('40) Chitaley, O. 40 R. 1, N. 22.

* A. I. R. (29) 1942 Lahore 129

DALIP SINGH AND DIN MOHAMMAD JJ.

*Sayed Mahbub Hussain Shah and others — Judgment-debtors —**Appellants*

v.

*Anjuman Imdad Qarza, Chak No. 353, Jhang Branch, through Chaudhri Latif Din, Liquidator, Decree-holder and others, Judgment-debtors —**Respondents.*

Letters Patent Appeal No. 132 of 1940, Decided on 26th November 1941, from order of Bhide J., in Exn. F. A. No. 449 of 1939, D/- 5th March 1940.

(a) Minor — Decree or award against minor not properly represented is null and void.

There is lack of inherent jurisdiction in a Court to pass a decree against a minor if the minor is not properly represented. In the case of a minor who is not properly represented he must be taken to be no party to the proceedings at all and therefore any decree which is passed against him without his being a party to the proceedings is a decree passed without jurisdiction, and similarly an award passed

4. (1898) 1898 A.C. 469 : 67 L.J.P.C. 75 : 78 L.T. 506; 14 T.L.R. 373, Young v. Adams.

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against him is null and void as against the minor :
31 All. 573 (P. C.) and 32 Cal. 296 (P. C.), *Rel. on.*
[P 131 C 1]

(b) Executing Court — Powers of — Decree or award against minor — Execution of — Executing Court can decide whether Court or arbitrators had jurisdiction to pass decree or award — For this purpose it can hold inquiry as to whether minor was really minor and whether he was properly represented or not — It can treat application as suit if necessary.

The executing Court can always decide whether the Court which passed the decree had or had not inherent jurisdiction to pass the decree in question. Such a question cannot as a rule be solved merely by looking at the decree as it stands. Some kind of inquiry, however, limited in scope is obviously necessary. And in the case of a decree or award against a minor which is sought to be executed an inquiry as to whether a minor was a minor or not and whether he was properly represented or not, is not beyond the powers of the executing Court. Therefore an executing Court can go into the short questions of fact arising to determine whether the Court had or had not inherent jurisdiction to pass the decree or the arbitrator had or had not the inherent jurisdiction to make the award which he did do.

[P 131 C 1, 2]

In such cases a separate suit lies but the objection is after all a technical one and if an executing Court comes to the conclusion that in its view a separate suit is maintainable, instead of dismissing the objection raised on behalf of the aggrieved persons it should at once exercise its powers under sub-s. (2) of S. 47, Civil P.C., and convert the proceeding into a suit so long as no question of limitation and jurisdiction arises in the matter : *Case law discussed.*

[P 131 C 2]

(c) Arbitration — Award — No notice of proceedings, to party — Award is nullity.

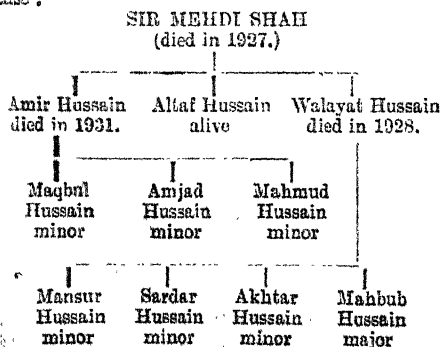
Where a person is not served with notice of the arbitration proceedings, an award passed therein as against him is a nullity and not capable of execution.

[P 131 C 2]

Shamair Chand and Prakash Chand Jain —
for Appellants.

Sekhru Ram and Sh. Abdul Karim —
for Respondent 1.

DALIP SINGH J. — The following pedigree-table is necessary to understand the facts of this case :



Altaf Hussain and Amir Hussain separately borrowed some money from a Co-operative Credit Society of Chak No. 353 known as the Anjuman

Imdad Qarza and Sir Mehdi Shah stood surety. On 7th March 1929 an award was given against Amir Hussain as principal debtor and Sir Mehdi Shah as surety and on the same date another award was given against Altaf Hussain and Sir Mehdi Shah as principal and surety respectively. It is agreed that Sir Mehdi Shah was dead at the time having died in 1927. The Co-operative Credit Society started execution proceedings against the present appellants and others as legal representatives of Sir Mehdi Shah. The appellants objected that the award against Sir Mehdi Shah was a nullity having been passed against a dead man. Thereafter, on 21st May 1935 the Society obtained another award against the appellants. It is alleged that no notice of any proceedings was given to the present appellants nor was any guardian of the minors properly appointed. Having obtained this award, the Society put in the fresh award in the execution Court. The execution Court, however, held that the second award was without jurisdiction. An appeal was taken to the High Court but the appeal was dismissed by a learned Judge in Single Bench. A Letters Patent Appeal was then filed. The appeal was accepted and the case was remanded for decision to the trial Court. This happened on 27th October 1938. After the remand the executing Court framed various issues. The only important issues that concern us are issues 1 and 2. (1) Whether in view of the awards dated 7th March 1929 there could be no fresh reference to arbitration and the subsequent awards were a nullity on the above ground? The Court held that the subsequent award was not a nullity. On issue 2 which was divided into two parts (a) and (b) it held that no notice had been given of the proceedings or of the reference to the present appellants before us as legal representatives of Sir Mehdi Shah and that no guardian-ad-litem had been appointed of the minor legal representatives, but it held that the executing Court could not on this ground declare that the subsequent award was void on the strength of a ruling, A. I. R. 1933 Lah. 376,¹ which appears to be in point. It therefore passed an order overruling the objections of the legal representatives of Sir Mehdi Shah including the present appellants before us and directed execution to issue against them. From that order an appeal was taken to this Court and a learned Judge in Single Bench in a brief order, dated 5th March 1940, dismissed the appeal holding on the strength of four rulings quoted by him in the judgment, namely, A. I. R. 1936 Lah. 442,² A. I. R. 1936 Lah. 901,³ A. I. R. 1935 Lah. 631⁴ and A. I. R. 1939 Lah. 40,⁵ that the executing Court had no jurisdiction to question the validity of the award. Having come to this conclusion he dismissed the appeal and in view of all the circumstances left the parties to bear their own costs.

A Letters Patent appeal has been taken from this

1. ('33) 20 A.I.R. 1933 Lah. 376 : 146 I.C. 565, *Narinjan v. Co-operative Credit Society.*
2. ('36) 23 A.I.R. 1936 Lah. 442: 168 I.C. 278: 38 P.L.R. 698, *Abdul Aziz v. Anjuman Imdad Bahmi Karza.*
3. ('36) 23 A.I.R. 1936 Lah. 901 : 168 I.C. 49 : I.L.R. (1937) Lah. 92 : 38 P.L.R. 1113, *Anjuman Dehi v. Kabir Singh.*
4. ('35) 22 A.I.R. 1935 Lah. 631: 161 I.C. 248: 38 P.L.R. 355, *Hira Nand v. Anjuman Imdad-I-Qarza Mausuma, Sunar Bank.*
5. ('39) 26 A.I.R. 1939 Lah. 40 : 180 I.C. 242 : 41 P.L.R. 225, *Balwant Singh v. Anjuman Imdad Bahami Qarza.*

decision and the learned counsel contends, on the authority of A.I.R. 1938 Lah. 515⁶ which followed 31 All. 572,⁷ a Privy Council ruling, that the decision of the learned Judge in Single Bench is incorrect. The learned counsel for the appellants has also cited 32 Cal. 296.⁸ He has also relied on O. 32, R. 4 (3), Civil P. C., that the consent of the guardian to be appointed is necessary. For this purpose he has cited A.I.R. 1923 Cal. 692⁹ and A.I.R. 1938 Pat. 971¹⁰ in which rulings it was held that if such consent of the guardian to the appointment is not obtained, the decree is passed without the minors being properly represented and is void and without jurisdiction. As regards the major appellant, it is contended that it is one of the principles of natural justice that the party against whom a final judgment is passed must have been given an opportunity to be heard, but there is nothing on this record to show that the party was heard beyond the statement of the arbitrator which was not believed or accepted by the trial Court. Therefore, even against the major appellant the proceedings are without jurisdiction and null and void. For this purpose the counsel relied on 47 Cal. 29,¹¹ A.I.R. 1921 Cal. 657,¹² I.L.R. (1940) 1 Cal. 82,¹³ and A.I.R. 1935 Rang. 3761¹⁴ at page 385, a Full Bench ruling. The question of law involved had led to some conflict of opinion but it appears to me to be entirely settled by the Privy Council rulings in 31 All. 572⁷ and 32 Cal. 296.⁸ These rulings lay down that there is lack of inherent jurisdiction in a Court to pass a decree against a minor if the minor is not properly represented. Their Lordships held that in the case of a minor who is not properly represented he must be taken to be no party to the proceedings at all and therefore any decree which is passed against him without his being a party to the proceedings is a decree passed without jurisdiction, and similarly an award passed against him is null and void as against the minor. There can be no doubt now in view of the decision of their Lordships of the Privy Council in 60 Cal. 670¹⁵ that the executing Court can always decide whether the Court which passed the decree had or had not inherent jurisdiction to pass the decree in question. This proposition can now no

longer be disputed. It seems, however, to have caused some confusion in the matter as to whether the executing Court could only look at the decree itself to determine this question or could make any enquiry on the subject in order to determine the very limited point involved, namely, whether there was lack of inherent jurisdiction in the Court passing the decree or not. This question appears to me always to involve a certain enquiry, however limited the scope of that enquiry may be. For instance, it is now settled law that a decree against a dead man is a nullity but in order to allow the executing Court to determine whether the man was or was not dead at the time when the decree was passed there must be some evidence to show whether the man was dead or not.

Similarly, if a decree is held to be without pecuniary or territorial jurisdiction, there must be some evidence apart from the decree as to whether the Court that passed the decree had or had not pecuniary or territorial jurisdiction to pass the decree. Such questions cannot as a rule be solved merely by looking at the decree as it stands. Some kind of enquiry however limited in scope is obviously necessary. I fail to see why a possibly more extended enquiry, namely, as to whether a minor was a minor or not and whether he was properly represented or not, should be beyond the powers of the executing Court. It is conceded that a separate suit would certainly lie. If so, it would, under the provisions of S. 47, cl. (2), Civil P. C., merely become a matter of court-fees as to whether the question was treated as one arising in execution or was treated as arising in a suit framed for that purpose. Be that as it may, it seems to me impossible to hold that the executing Court has no jurisdiction to decide whether there is or is not a decree which it is called upon to execute for this is all that is really meant by saying that the executing Court can enquire whether there was lack of inherent jurisdiction in the Court which passed the decree. This being so, I am unable to see that the executing Court cannot go into the short questions of fact arising to determine whether the Court had or had not inherent jurisdiction to pass the decree or the arbitrator had or had not the inherent jurisdiction to make the award which he did do. This being so, it seems to me that the decision of the learned Judge in Single Bench with all respect is not correct.

To dispose of the matter finally we have gone into the evidence of the arbitrator which, as pointed out, was not accepted by the learned trial Court. On looking at that evidence it does not appear that the arbitrator even states that, so far as the present minor appellants are concerned their brother either agreed or was asked to be their guardian ad litem for the purposes of the award. Even if it were so, his evidence, as held by the trial Court, is otherwise unsatisfactory and I would not be prepared to rely on it to prove either that the major appellant was served with notice of the proceedings or that he was ever asked to act as guardian of his minor brothers or that he consented to do so. In those circumstances, it appears to me that the award was a pure nullity, it violated the principles of natural justice and violated the provision of law that a minor cannot appear in any proceedings without a guardian ad litem being appointed on his behalf. This being so, I would accept this appeal and declare that there is no award capable of execution against the present appellants. I may note here that Safdar Hussain, one of the minors, is now dead and is represented by his major brother and two minor

6. ('38) 25 A.I.R. 1938 Lah. 515: 179 I.C. 146: 40 P.L.R. 857, Pir Taj-ud-din v. Khambatta.

7. ('09) 31 All. 572: 3 I. C. 864: 36 I. A. 168: 6 A. L. J. 822 (P. C.), Rashid-unissa v. Muhomed Ismail Khan.

8. ('05) 32 Cal. 296: 32 I. A. 23: 8 Sar. 734: 9 C.W.N. 201: 1 C.L.J. 584 (P.C.), Khizarjmal v. Daim.

9. ('23) 10 A.I.R. 1923 Cal. 692: 72 I.C. 475: 37 C.L.J. 496, Umapati Samanta v. Sheikh Masitulla.

10. ('38) 25 A.I.R. 1938 Pat. 97: 173 I.C. 644: 16 Pat. 632: 19 P.L.T. 259, Baraik Ram v. Chowra Uraon.

11. ('20) 7 A.I.R. 1920 Cal. 386: 56 I.C. 325: 47 Cal. 29, Louis Dreyfus and Co. v. Purnsothum Das Narain Das.

12. ('21) 8 A.I.R. 1921 Cal. 657: 66 I.C. 389: 34 C.L.J. 39, Hari Singh Nehal Chand v. Kanki-narah Co. Ltd.

13. ('40) 27 A. I. R. 1940 Cal. 198: 188 I. C. 213: I. L. R. (1940) 1 Cal. 82: 70 C. L. J. 492, Chatra Serampore Co-operative Credit Society Ltd. v. Gopal Chandra Mitra.

14. ('35) 22 A.I.R. 1935 Rang. 376: 158 I.C. 865: 13 Rang. 648 (F.B.), U Pyinnya v. U Ottama.

15. ('33) 20 A.I.R. 1933 P.C. 61: 142 I.C. 324: 60 Cal. 670: 60 I. A. 71 (P. C.), Jnanendra Mohan Bhaduri v. Rabindranath Chakrabarti.

brothers. In the circumstances I would leave the parties to bear their own costs.

DIN MOHAMMAD J. — The facts found by the trial Court as stated by my learned brother are that on 21st May 1935 when the award was delivered no steps were taken to appoint a guardian ad litem of the minors nor was the major defendant Mahbub Hussain apprised of the proceedings. In other words, an award was made in the absence of the defendants without informing them of the existence of the proceedings. This award was, as permitted by the Co-operative Societies Act, presented to a civil Court for execution. The executing Court refused to give effect to the objections taken both on behalf of the minor judgment-debtors as well as on behalf of the major judgment-debtor that the award was a nullity and could not therefore be executed. The learned Judge in Single Bench, who heard the appeal against the order, also agreed with the Court below on the ground that no such objection could be entertained by an executing Court. The sole question that arises for determination in this case is whether an objection on the score of the nullity of an award could be raised in and entertained by an executing Court. It was conceded by counsel for the respondent that if a decree is a nullity, an executing Court can go behind it. The earliest decision on this point brought to our notice is 32 Cal. 296.⁸ At pp. 314-15 their Lordships of the Privy Council observed as follows :

"It is not pretended that Alahnawaz was in any legal sense or in fact his (Amir Bakhsh's) guardian or was ever appointed his guardian ad litem. . . . In Suit No. 372 of 1879 and No. 160 of 1878, the Judge seems to have accepted without question the statement on the record that Amir Bakhsh was legal representative of Naurez, and Alahnawaz was his guardian and never applied his mind to the matter. Doubtless he would have done so if the suits had proceeded in the ordinary course, but in the former case the proceeding were cut short by the agreement for reference, and in the latter case it was in effect a consent decree. It was not therefore the case of an erroneous decision, ruling, or exercise of discretion of the Judge in a matter in which the Court had jurisdiction. Their Lordships think that the estate of Naurez was not represented in law or in fact in either of the suits, and the sale of his property was therefore without jurisdiction and null and void. Nor can they hold that the share of Amirbakhsh himself in his father's estate was bound. In the opinion of their Lordships, it is not a mere question of form but one of substance."

This decision was followed in 28 All. 137¹⁰ by Sir John Stanley C. J. and Burkitt J. Kt. and it was held that where the provisions as to the appointment of a guardian ad litem for a minor are not substantially complied with, the minor is not properly represented, and any decree which may be passed against him is a nullity. About four years later, the matter of an unrepresented minor went again before their Lordships of the Privy Council in a case reported in 31 All. 572.⁷ In that case a minor had instituted a suit to avoid certain sales which had taken place without appointing any proper guardian for her. At p. 581 their Lordships observed as follows :

"It was not seriously contended before their Lordships that these arbitration proceedings, so far as the appellant's interest is concerned, could be supported. She was then about four years of age,

16. ('05) 28 All. 137 : 2 A.L.J. 615 : 1905 A.W.N. 229, Hanuman Prasad v. Muhammad Ishaq.

and her consent seems to have been taken for granted to what was no doubt considered a fair family arrangement. But it has never been ratified by her, and is inoperative as regards her interest in her father's property. It is true that, in the award, her sister Ulfat-un-Nisa is described as acting 'for herself and as guardian of Abdul Majid Khan and Rashidan minors'; but at the date of the award, 12th January 1889, an application was actually pending in her name in the Court of the District Judge of Meerut for a certificate of guardianship of these minors, and this application was rejected by the above mentioned order of 13th April 1889. The statement in the award was therefore unjustified, and the appellant is entitled to the declaration which she seeks, that the award is a nullity, as far as she is concerned."

In A.I.R. 1937 Rang. 126,¹⁷ too, a decree obtained against a minor without proper representation was declared to be a nullity. A similar question came before a Division Bench of this Court composed of Sir James Addison and myself (A.I.R. 1938 Lah. 515)⁶ and after considering 5 Lah. 541¹⁸ on which reliance has been placed by counsel for the respondent we came to the conclusion that an objection could be raised in execution by a minor on the score that he was not properly represented at the time when the decree was obtained. Reliance in this connection was placed on 31 All. 572⁷ as also on 60 Cal. 670¹⁵ where their Lordships had allowed an objection to be entertained in the course of execution proceedings that the decree was without jurisdiction and therefore a nullity. It may be observed that in 53 Cal. 166¹⁹ a Full Bench of the Calcutta High Court had also held that "where a decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits, the executing Court is authorized to question the validity of a decree."

The only point stressed by counsel for the respondent is that the contrary decisions have also been based on 31 All. 572⁷ and that the only course open to a minor in such circumstances is to institute a separate suit with a view to avoid such a decree. Reference in this connexion is made to the remarks made by their Lordships of the Privy Council in 31 All. 572⁷ at p. 582. The High Court had observed in that case that the proper course for the minor plaintiff, if she had any objection to make to the execution of the decrees, was to raise her objections under the provisions of S. 244, Civil P. C., (S. 47 of the present Code) and not by a separate suit. While referring to these remarks of the High Court their Lordships observed as follows :

"With all respect to the learned Judges of the High Court, their Lordships are unable to agree with this conclusion. Section 244, Civil P. C., applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code.

17. ('37) 24 A.I.R. 1937 Rang. 126 : 169 I.C. 967 : 1937 R. L. R. 164, Ma We Gyan v. Maung Than Byu.

18. ('24) 11 A.I.R. 1924 Lah. 448 : 78 I.C. 460 : 5 Lah. 54, Lahore Bank Ltd. v. Ghulam Jilani.

19. ('25) 12 A.I.R. 1925 Cal. 907 : 89 I.C. 685 : 53 Cal. 166 : 42 C. L. J. 1 : 29 C. W. N. 948 (F. B.), Gorachand Haldar v. Prafulla Kumar Roy.

Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term."

It is true that it is possible to argue on the basis of these remarks that a minor not being a party in the proper sense of the term is not covered by the terms of S. 47, Civil P. C., but I fail to comprehend how a decree can be executed against a person who is not a party to it and why such person should be debarred from contesting it in the executing Court that the decree cannot be executed against him on the simple ground that no decree has been passed against him. It was on this ground that an objection to this effect was entertained on behalf of a minor in the course of execution proceeding in A.I.R. 1938 Lah. 515⁶ and 5 Lah. 511⁸ was dissented from.

Moreover, I am disposed to consider that most of these judgments which insist on a separate suit being brought for the purpose of avoiding a decree have ignored the provision as contained in sub-s. (2) of S. 47, Civil P. C., which clearly lays down that: "The Court may subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fee."

If the executing Courts keep this provision in mind, much hardship and inconvenience will be saved. The objection is after all a technical one and if an executing Court comes to the conclusion that in its view a separate suit is maintainable, instead of dismissing the objection raised on behalf of the aggrieved persons it should at once exercise its powers under sub-s. (2) of S. 47 and convert the proceeding into a suit so long as no question of limitation and jurisdiction arises in the matter. The learned Judge in Single Bench has in support of his decision relied on A.I.R. 1935 Lah. 631,⁴ A.I.R. 1936 Lah. 442,² A.I.R. 1936 Lah. 901³ and A.I.R. 1939 Lah. 405⁵ and it is necessary therefore to examine them in order to see whether they touch the point at issue or otherwise lay down good law. In A. I. R. 1935 Lah. 631,⁴ the executing Court had recorded full satisfaction of the awards originally put in. In spite of this, the registrar once more appointed an arbitrator in respect of the same matter and an award was obtained in relation to the sums already remitted. The aggrieved party instituted a suit for a declaration that the subsequent award was ineffectual and unenforceable and for an injunction to restrain the Society from executing it. Agha Haider J. held that the award was ultra vires and the suit could be entertained by a civil Court. This case therefore is obviously beside the mark.

In A. I. R. 1936 Lah. 442,² Bhido J. followed a previous decision of Addison J. as reported in A.I.R. 1926 Lah. 547²⁰ and observed that it is a well-established rule that an executing Court has no jurisdiction to question the validity of the decree sought to be executed. It is remarkable in both these cases that no authority was cited or discussed and it was taken for granted that this was settled law. These rulings run counter to the numerous decisions of the various High Courts in India as well as of the Privy Council where executing Courts have been allowed to question the validity of decrees if there was inherent lack of jurisdiction in the Court that had passed the decree and if I may say so with all respect have not been correctly decided.

20. ('26) 13 A.I.R. 1926 Lah. 547; 97 I.C. 288; 27 P. L. R. 706, Ahmad Yar v. Co-operative Credit Society.

It is significant that in A.I.R. 1929 Lah. 449²¹ and A.I.R. 1938 Lah. 515,⁶ to both of which Addison J. was a party, it was laid down that as between the parties to a decree, the question whether a decree is a nullity is to be determined by the executing Court itself and not by a separate suit. It is true that in his previous decision Addison J. had remarked that in the case of an award under the Co-operative Societies Act, all that the executing Court has to do is to execute the award as if it was its own decree. But even if this is so, the executing Court is in no wise precluded from exercising all those powers which it can exercise in respect of the execution of its own decrees. In other words, if it is empowered to determine the question whether a decree sought to be executed is a nullity, it is not robbed of that power when the decree happens to be an award under the Co-operative Societies Act, which is to be enforced and executed as a decree.

In A. I. R. 1936 Lah. 901,³ a Division Bench of this Court dealt with a case of the same nature as the one in A. I. R. 1935 Lah. 631⁴ and it is consequently irrelevant. In A.I.R. 1939 Lah. 40,⁵ Skemp J. remarked that if an award is objected to as being without jurisdiction, a separate suit alone is competent and the matter cannot be determined by the executing Court. No authorities appear to have been cited before the learned Judge nor has the matter been fully discussed. This decision therefore is also not of any binding authority. The trial Court while discussing this question relied on A.I.R. 1935 Lah. 376¹ in which Abdul Qadir J. sitting singly is reported to have laid down that the ground that a minor was not properly represented before the arbitrator is not sufficient to give jurisdiction to the civil Court to entertain a suit for a declaration that the award was not binding on the minor. Suffice it to say that the headnote does not correctly represent the judgment, inasmuch as the learned Judge did not give effect to the plea as he was not satisfied that the mother of the minor had died during the pendency of the suit. It is true that in an earlier part of the judgment he had also remarked that this plea was not covered by R. 7 framed under S. 43, Co-operative Societies Act, but it is apparent that there was no proper discussion of the question at issue, no reference to any authorities on the point one way or the other and no considered decision. The rule said to have been laid down by the learned Judge obviously goes beyond all the other authorities relied on by the respondent in so far as it bars even a separate suit. I accordingly agree that the appeals before us be allowed and the applications for execution presented against the present appellants be dismissed. I further agree that in the peculiar circumstances of the case the parties should be left to bear their own costs throughout.

K.S./R.K. *Appeals allowed.*

21. ('29) 16 A.I.R. 1929 Lah. 449; 120 I. C. 279, Parshottam Das Nathu Ram v. Radha Kishan.

C. P. C.—

(a) ('40) Chitaley, S. 47, N. 7, Pt. 9, O. 32, R. 3, N. 5, Pt. 1 and Sch. II, Para. 15, N. 13 Pt. 17.

(41) Mulla, Page 183, Pt. (k) and Page 1020, Pts. (i) and (m).

(b) ('40) Chitaley, S. 38, N. 8, Pt. 19 and S. 47, N. 82.

(41) Mulla, Page 164, Pts. (a) and (k), Page 197 Note "Sub-section 2: Court may treat suit as an application."

(c) ('40) Chitaley, Sch. II, Para. 10, N. 4, Pt. 4.

A. I. R. (29) 1942 Lahore 134

BHIDE J.

A. J. Heywood and another — Accused
Petitioners

v.

Emperor.

Criminal Misc. Cases Nos. 346 and 480 of 1941,
Decided on 25th November 1941, for transfer of case
from District Magistrate, Mianwali.

(a) Criminal P. C. (1898), S. 177—Offence of
illegal sale and transport of beer under Punjab
Excise Act — Beer sold by company at R and
sent to M under railway receipt with company
as assignee but endorsed in favour of purchaser
— Offence held committed in R and not in M.

The sale of beer in excess of the quantity allowed
under the Punjab Excise Act was entered in the
registers of a company at R and the liquor was
then sent to M under a railway receipt in which
the name of the consignee was also shown as the
company although the receipt was thereafter end-
orsed in favour of the purchaser :

Held that the offence of illegal sale as well as
illegal transport were committed at R and prima
facie the Court at M had no jurisdiction to try
these offences. [P 134 C 2]

(b) Punjab Excise Act (1 of 1914), S. 77 —
Purchase of beer in excess of quantity allowed
is no offence.

Under the Punjab Excise Act the sale of more
than the quantity allowed of beer is illegal but the
purchase of more than the quantity allowed at a
time is not punishable under any rule framed under
the Punjab Excise Act. Therefore, a person who has
purchased more than the quantity allowed of beer
cannot be said to have committed the offence of
transporting foreign liquor when he takes such beer
purchased from the station to his house.

[P 134 C 2]

(c) Criminal P. C. (1898), S. 561A — No
offence disclosed by prosecution case — Pro-
ceedings can be quashed.

The High Court can quash proceedings under
S. 561A against an accused when the prosecution
case discloses no offence at all against him.

[P 135 C 1]

R. L. Anand — for Petitioners.

Jamil Asghar for Advocate-General —

for the Crown.

ORDER. — Criminal Miscellaneous Petitions
Nos. 346 and 480 of 1941, are connected and will
be disposed of together. The first petition is for
transfer of a case under S. 61, Punjab Excise Act,
pending in the Court of District Magistrate, Mian-
wali, against three persons, namely (1) Mr. A. J.
Heywood, Manager of Messrs. Spencer & Co. Ltd.,
Rawalpindi, (2) Dev Raj, Head Agency clerk, Messrs.
Spencer & Co. Ltd., Rawalpindi, and (3) Seth Sita
Ram Kalra of Mianwali. The first ground on which
the petition for transfer was based was that the
District Magistrate of Mianwali and the Superin-
tendent of Police, Mianwali, were taking keen inter-
est in the case and the petitioners (Mr. Heywood
and Dev Raj) did not expect to get a fair trial. Mr.
Hubbard, the District Magistrate of Mianwali, has,
however, been transferred and succeeded by Mr.
Addison. The learned counsel for the petitioners
had therefore to concede that this ground had

ceased to have force. He, however, contended that
the offence, if any, was committed at Rawalpindi
and therefore the Court at Mianwali has no juris-
diction to try this offence. The petition of Sita Ram
was under S. 561A, Criminal P. C. His contention was
that the prosecution case disclosed no offence at all
against him and therefore the proceedings should
be quashed so far as he was concerned.

The learned counsel for the Crown was unable to
explain the case for the prosecution clearly when
the petition for transfer came up before me on 14th
November 1941. He was, therefore, asked to put in
a clear statement of the prosecution case and this
has now been done. So far as I can see from the
statement, the case against the petitioners, Mr.
Heywood and Dev Raj, is that they sold 9 gallons
of beer to Sita Ram although according to the
licence of Messrs. Spencer and Co. Ltd., Rawal-
pindi (of which company Mr. Heywood is the mana-
ger) they could not sell more than 2 gallons of
foreign liquor (which expression includes beer) at a
time and secondly, that they transported the
'foreign liquor' to Mianwali when they had no
authority to do so, by using a transport pass which
was no longer in force. According to these allega-
tions, it would appear that the offence of these two
petitioners was committed at Rawalpindi and not
at Mianwali. The foreign liquor was sent at the
instance of one Lala Jodha Ram, retired Tahsildar,
who wrote to Mr. Spencer & Co. Ltd., on behalf of
his relation Sita Ram to send it to Mianwali. The
sale was entered in the registers of Messrs. Spencer
& Co., Ltd., and the liquor was then sent to Mian-
wali under a railway receipt in which the name of
the consignee was also shown as Messrs. Spencer &
Co., Ltd., although the receipt was thereafter end-
orsed in favour of Sita Ram. If Messrs. Spencer &
Co., Ltd., were not entitled to transport liquor, the
offence of illegal transport was also committed at
Rawalpindi as soon as the liquor was despatched
from that station. Mr. Heywood has been prosecuted
only under S. 77, Punjab Excise Act, as he, as a
licensee, is liable for the acts of Dev Raj, his em-
ployee, under that section. As the offences of illegal
sale as well as illegal transport were committed at
Rawalpindi, prima facie it seems to me that the
Courts at Mianwali had no jurisdiction to try these
offences.

So far as Sita Ram was concerned, it was con-
ceded that there was no limit prescribed under the
Punjab Excise Act or the rules thereunder for pos-
session of foreign liquor but it was contended that
he was guilty of an offence inasmuch as he 'trans-
ported' the foreign liquor from the Mianwali rail-
way station to his own house. This position appears
to me to be hardly intelligible. As there is no limit
to possession of foreign liquor, I cannot see how
Sita Ram could be held guilty of transporting the
liquor when he was apparently doing so merely for
his own use. Otherwise a person will not be able to
take liquor purchased by him from a shop to his
own house without a license for 'transport.' This
would be absurd. The sale of more than two gallons
was illegal; but it is not contended that the pur-
chase of more than two gallons at a time is punish-
able under any rule framed under the Punjab Ex-
cise Act. It was the business of Spencer & Co. to
see that they were not selling more liquor than they
were authorized to do to a private consumer like
Sita Ram. The liquor was sent on receipt of a letter
from Lala Jodha Ram retired tahsildar and he had
ordered Messrs. Spencer & Co. to send the liquor to
Lala Sita Ram Kalra, only if they could do so. The
learned counsel for the Crown also contended that

the habit of selling foreign liquor to point out any witness mentioned who was to depose to this effect. In fact, it seems to me that there is against the petitioner Sita Ram.

Heywood and Dev Raj are concerned to be a *prima facie* case but as the facts which they were charged were complicated, the case should be tried there. I accept the petition for transfer and the case to be transferred to the Court of the District Judge at Rawalpindi. The District Judge at Rawalpindi may try the case himself or refer it to some other competent Court at his disposal. There being no case against the petitioner Sita Ram, the proceedings are hereby quashed. The petitioners and Dev Raj should appear before the District Judge at Rawalpindi, on 10th December next at a date for their trial either before some other Magistrate.

Order accordingly.

Lahore, S. 177 N. 4.
S. 177 Page 564 N. 547.
Lahore, S. 561A N. 6.
561A Page 1804 Note 'Quash pro-

(29) 1942 Lahore 135

BHIDE J.

Bakhsh and others—Defendants
—Appellants

v.

Mohammad (major) and others,
Sons and others—Defendants
—Respondents.

No. 58 of 1941, Decided on 14th February 1941.

C. (1908), O. 41, R. 23—Preliminary decree of.

The point does not necessarily mean as to the merits of the case but includes a question of fact or law, the decision on the decision of other issues arising necessary: (22) 9 A. I. R. 1922 Mad. 100. [P 136 C 1]

Respondents — Ouster of one by other — Sale of joint property by cosharer — Right to show that other cosharers' interest — Such mortgage is subject to the shares of parties at time of

In order to prove ouster of the other party, not only prove that he was treating the property as though it belonged exclusively to him, but also that at this fact was known to the other party. The mere fact that a cosharer has mortgaged the property is not sufficient to show that he is ousting the title of the other cosharer. In such a case must be held that the adjustment of the shares of the parties at time of partition. [P 136 C 1]

Respondents — Finding that cosharer failed to prove that he treated property as exclusively his, the court held that he was not entitled to knowledge of other cosharers' interest — It cannot be interfered with by the court.

A finding that the cosharer had failed to prove that he had been treating the property as though it belonged to him exclusively to the knowledge of the other cosharers, is a finding of fact and cannot be interfered with in second appeal. [P 136 C 2]

(d) Mortgage — Co-mortgagor redeeming entire mortgage is mortgagee and not chargeholder in respect of share of other cosharers.

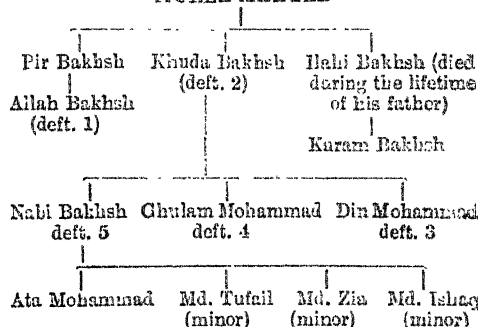
The position of a co-mortgagor, who redeems the entire mortgage, is that of a mortgagee and not of a mere chargeholder in respect of the share of the other cosharers: (33) 25 A. I. R. 1934 Lah. 184, *Foll.*; (31) 18 A. I. R. 1931 Lah. 711, *Reported*. [P 136 C 2]

Dr. Shuja-ud-Din — for Appellants.

Mohammad Hussain — for Respondents.

JUDGMENT.—The pedigree-table of the parties is as follows:

MULLA MEHTAB



The house in dispute was originally owned by Mulla Mehtab and was inherited by his sons Pir Bakhsh and Khuda Bakhsh who became joint owners thereof in equal shares, the third son Ilahi Bakhsh having died during the lifetime of his father. On 19th June 1883 Pir Bakhsh and Khuda Bakhsh executed two mortgage deeds in respect of two separate portions of the house in favour of Karam Bakhsh son of Ilahi Bakhsh and the other in favour of one Gulab. The mortgage in favour of Karam Bakhsh was subsequently redeemed by Khuda Bakhsh alone in the year 1891 on payment of Rs. 1300. Khuda Bakhsh thereafter appears to have been dealing with the property as though he were an owner thereof, although he was according to law owner of only one half and mortgagee of the other half. In August 1938 Allah Bakhsh son of Pir Bakhsh sold his one half share in the property to the sons of Nabi Bakhsh for Rs. 2000 and thereafter these persons sued for possession by redemption of one half share in the house on payment of Rs. 500. This suit was resisted by Khuda Bakhsh and the other defendants on the ground that Khuda Bakhsh had become owner of the portion of the house which was in dispute, by a private partition and that Allah Bakhsh had no right to sell it. The defendants also pleaded that the suit was barred by limitation. The trial Court upheld the defendants' plea that Khuda Bakhsh was the sole owner of the house and dismissed the suit. On appeal the learned Senior Subordinate Judge held that Khuda Bakhsh only held one half share in the house and that the plaintiffs were entitled to redeem the other half. He, however, found that the trial Court had given no finding on the question of compensation which was claimed by the defendants on account of certain improvements made by them on the mortgaged property. He therefore accepted the appeal and remanded the case to the

lower Court for decision of the remaining points involved in the case. From this order the present appeal has been preferred.

A preliminary objection was raised that the appeal was incompetent as the remand was made by the learned Senior Sub-Judge in the exercise of his inherent powers under S. 151, Civil P. C. It was urged that the trial Court had not decided the case merely on a preliminary point but on a finding on the main issue, namely, whether Khuda Bakhsh was the exclusive owner of the house or not and therefore the remand order could not fall within the scope of O. 41, R. 23, Civil P. C. There seems to be no force in this contention. The trial Court had framed seven issues but had decided only two, namely, the question of limitation and the question whether Khuda Bakhsh was the sole owner of the house. The remaining issues had not been decided as it was found unnecessary to go into them in view of the finding on the first two issues. It has been held by a Full Bench of the Punjab Chief Court that a preliminary point does not necessarily mean a point collateral to the merits of the case but would include any point whether of fact or law, the decision on which renders the decision of other issues arising in the case unnecessary. A similar view was taken by a Full Bench of the Madras High Court in 45 Mad. 900.¹ I accordingly overrule this objection. Coming to the merits of the appeal the learned counsel for the appellants urged that the learned Senior Sub-Judge was not competent to hear the appeal before him as the value for jurisdiction exceeded Rs. 500. It does not appear from the judgment of the learned Senior Sub-Judge that the question of jurisdiction was raised before him. The plaintiffs sued for redemption on payment of Rs. 500 only and in the circumstances I do not see how the Senior Sub-Judge can be said not to have had jurisdiction to hear the appeal.

The second point argued by the learned counsel for the appellants was that of limitation. It was urged that even if Khuda Bakhsh was the owner of only one half of the house, he had redeemed the mortgage of the entire house in the year 1891 and had been in adverse possession thereof since then. It was therefore contended that the suit was barred by limitation under Art. 144, Limitation Act. The plea of adverse possession does not however appear to have been specifically raised in the Courts below and this was conceded by the learned counsel; but he urged that the defendants had pleaded that Khuda Bakhsh had been mortgaging the property from time to time treating it as though it was his exclusive property. But the position of Khuda Bakhsh was that of a cosharer and the mere fact that a cosharer has mortgaged the joint property is not sufficient to show that he was repudiating the title of the other cosharers. The mortgage in such a case may be held to be subject to the adjustment of the shares of the parties at the time of partition. As a matter of fact it was pleaded by the defendants that there had been a partition between Khuda Bakhsh and Pir Bakhsh but this alleged partition has not been proved. Moreover, in order to prove ouster of the other cosharers, the defendants had not only to prove that Khuda Bakhsh was treating the property as though it belonged exclusively to him but also that this fact was known to the other cosharers. The learned Senior Sub-Judge has given a finding that the defendants have failed to prove

that Khuda Bakhsh had been treating the property as though it belonged to him exclusively to the knowledge of the other cosharers. This is a finding of fact and the learned counsel for the appellants has not been able to show me any good reason for interference with it in second appeal. The learned counsel contended that the position of Khuda Bakhsh was merely that of a charge-holder and in support of his contention he referred to 12 Lah. 671.² But according to the latest decision of this Court (see 19 Lah. 103³) in which previous rulings were considered the position of a co-mortgagor, who redeemed the entire mortgage, is that of a mortgagee and not of a mere charge-holder in respect of the share of the other cosharers. The learned counsel conceded that if the decision in 19 Lah. 103³ is followed, then the suit must be held to be within limitation. I uphold the decision of the learned Senior Sub-Judge and dismiss this appeal with costs.

G.N./R.K.

Appeal dismissed.

2. ('31) 18 A. I. R. 1931 Lah. 744 : 185 I. C. 506 : 12 Lah. 671 : 32 P. L. R. 622, Jhandu v. Nur Mahomed.

3. ('38) 25 A. I. R. 1938 Lah. 184 : 178 I. C. 778 : (1938) 19 Lah. 103 : 40 P. L. R. 546, Abdul Ghafoor Khan v. Firm Mangat Rai Ganga Sahai.

C. P. C.—

(a) ('40) Chitaley, O. 41, R. 23, N. 3, Pts. 1 & 1a.

(c) ('41) Mulla, Page 1182, Pts. (i) & (j).

(c) ('40) Chitaley, Ss. 100 & 101, N. 52, Pt. 4.

(c) ('41) Mulla, Page 366, Pt. (a) and Page 367 Pt. (g). Limitation Act —

(b) ('41) Chitaley, Arts. 142 & 144, N. 35, Pts. 9 & 23.

(c) ('38) Rustomji, Page 1467, Pt. 6, Page 1468, Pts. 7 & 8 and Page 1471, Pt. 1.

T. P. Act —

(d) ('36) Mulla, Pages 540 & 541 Note "Subrogation."

(c) ('34) Mitra, Page 527 Note "Rights of redeeming co-mortgagor."

A. I. R. (29) 1942 Lahore 136

BHIDE J.

Waryam Singha and others —

Appellants

v.

Sher Singh and others — Respondents.

Exn. Second Appeal No. 479 of 1941, Decided on 19th January 1942, from order of Senior Sub-Judge, Hoshiarpur, D/- 17th December 1940.

(a) Civil P. C. (1908), O. 1, R. 8 — Defendant knowing about representative suit but not applying to be impleaded and decree passed — Fact of their names not being mentioned in notice does not make decree nullity.

In a representative suit, some were appointed to represent the defendants and a decree was passed. In execution of the decree against some of the defendants other than the representatives, it was contended that as their names were not mentioned in the notice under O. 1, R. 8, the decree was a nullity.

Held that the defect in the notice was not sufficient to render the decree a nullity as they could have got themselves impleaded as defendants if they had any objection to the suit. [P. 137 C 2]

1. ('22) 9 A. I. R. 1922 Mad. 505 : 69 I. C. 828 : 45 Mad. 900; 45 M.L.J. 354 (F.B.), Raman Nayar v. Krishnan Nambudripad.

(b) Civil P. C. (1908), O. 1, R. 8 — Execution of decree for injunction in representative suit—Decree can be executed against all defendants and not merely chosen representatives.

A decree for injunction obtained in a representative suit is executable against defendants who are represented by other persons selected to represent them under O. 1, R. 8. The whole object of a representative suit would be defeated if it is held that a decree obtained in such a suit cannot be executed against any person except the chosen representatives. For, in a suit of a representative character, all the persons who are represented must be held to be parties as the decree obtained in such a suit is binding on all of them: 24 Mad. 658 and 30 Mad. 215, *Rel. on*; 12 Mad. 356 and 23 Mad. 483, *Expl.*

[P 137 C 2; P 138 C 1]

N. C. Pandit — for Appellants.

Shamair Chand — for Respondents.

JUDGMENT. — The material facts of the case giving rise to this second appeal are briefly as follows: Certain occupancy tenants and non-proprietors of the village Rampur in the Hoshiarpur District instituted a suit against the proprietors for an injunction to restrain them from obstructing the plaintiffs in the exercise of their rights of grazing in shamilat land in the village. The suit was of a representative character and certain persons on each side were selected to represent the parties. An application for the purpose was duly made under O. 1, R. 8, Civil P. C., and seven out of the proprietors were appointed to represent the defendants. The trial Court dismissed the suit but it was decreed by the District Judge and his decision was affirmed by the High Court. Subsequently, Waryam Singh one of the plaintiffs applied for execution of the decree against seven of the proprietors who according to his allegations had obstructed him in the exercise of the right of grazing his cattle in the aforesaid shamilat area. The application for execution was resisted by these proprietors on the ground that the notice under O. 1, R. 8, was not duly served upon the defendants and therefore the decree in question was not binding on them. Secondly, it was pleaded that the decree being one for an injunction could not be executed against any person except the seven representatives who were actually made parties to the case.

As regards the first point, the allegation of the proprietors was that the names of the seven persons who were to represent the defendants were not given in the notice issued under O. 1, R. 8, Civil P. C., and consequently the notice was vitiated. This objection was overruled by the trial Court and the application for execution was allowed. On appeal the learned Senior Sub-Judge also agreed with the executing Court that the alleged defect in the notice under O. 1, R. 8, was not sufficient to render the decree a nullity; but he held following the decisions in 12 Mad. 356¹ and 23 Mad. 483² that the decree for injunction could not be executed against the seven proprietors against whom execution was sought because they were not actually impleaded and were merely represented by seven other persons who were chosen as representatives of all the defendants. The prayer for execution of the decree for injunction under O. 21, R. 32, Civil P. C., was therefore disallowed. From this decision the present appeal has been preferred.

1. ('89) 12 Mad. 356, Sadagopalachari v. Krishnamachari.

2. (1900) 23 Mad. 483; 10 M. L. J. 117, Thandavara Pillai v. Subbayyar.

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The learned counsel for the appellants urged that there was nothing on the record to show that the notice under O. 1, R. 8, was defective but it appears that the record containing the notice has since been destroyed. It was apparently admitted before the trial Court that the notice did not contain the names of the seven persons chosen to represent the defendants and I see therefore no reason to interfere with this finding of the Courts below. I am however of opinion that this defect in the notice could not be considered to be sufficient to render the decree a nullity. It appears from the record that ten out of the defendants did apply to the Court on learning of the notice to be impleaded as defendants and they were accordingly joined as defendants in addition to the seven persons who had been chosen to represent the defendants generally. The mere fact that the names of the seven persons were not actually mentioned in the notice would seem to be not very material because if the proprietors in the village came to know that a representative suit was being instituted in connexion with the shamilat land and if they had any objection to the suit, they could have easily appeared in the Court and ascertained the names of the persons who were chosen as their representatives. They could then have either asked to be impleaded as defendants as ten out of the proprietors did. As no such action was taken by the proprietors against whom execution was sought, it must be presumed that they were content to allow the representative suit to be prosecuted against them without any objection to the procedure adopted. I therefore agree with the finding of the learned Senior Sub-Judge that the decree in question cannot be considered to be a nullity.

The second point for consideration is whether the decree for injunction can be executed against any of the proprietors excepting the seven persons who were chosen as representatives. The learned Senior Subordinate Judge has relied on two rulings of the Madras High Court referred to above but the second ruling merely follows the first one, namely, 12 Mad. 356¹ without any independent discussion of the matter. It would therefore be sufficient to consider the decision in 12 Mad. 356.¹ The decree which was sought to be executed in that case as passed in the year 1840, that is, at a time when there was apparently no statutory provision corresponding to O. 1, R. 8, Civil P. C., in force. There was a dispute between two sects of Vaishnav Brahmins relating to the worship of an idol and the decree directed that one of the sects should not worship the idol in any house situated in a particular street. The decree was thus of a personal character. In the present instance the decree does involve rights to property, namely, shamilat land, and can be distinguished on this ground. I note that in the Madras case the execution was also held to be time-barred and consequently the remarks relating to the executability of a decree for injunction in the circumstances of the case were in the nature of obiter dicta. I may also add that I do not understand why a decree for injunction should not be executable against defendants who are represented by other persons selected to represent them under O. 1, R. 8, Civil P. C. The whole object of a representative suit of this kind would be defeated if it is held that a decree obtained in such a suit cannot be executed against any person except the chosen representatives. As pointed out in 24 Mad. 658³ and 30 Mad. 215⁴ in a suit of a representative

3. ('01) 24 Mad. 658, Kamalkutti v. Ibrayi.

4. ('07) 30 Mad. 215; 17 M. L. J. 377; 2 M.L.T. 31, Mathu Amma v. Pathram Kunnot Charukot.

a character like this all the persons who are represented must be held to be parties as the decree obtained in such a suit is binding on all of them. The case might be different where the injunction obtained applies only to the persons who are chosen as representatives. But if the injunction applies not only to those persons but also to others who are represented by them, I see no good reason why the decree for injunction should not be executed against all of them. I accordingly accept the appeal and setting aside the decision of the learned Senior Sub-Judge, restore that of the executing Court. In view of all the circumstances, however, I leave the parties to bear their costs throughout.

K.S./R.K.

Appeal accepted.

C. P. C. —

(a) ('40) Chitaley, O. 1 R. 8, N. 16 Pt. 7.

(41) Mulla, Page 509 Note 'Notice of suit.'

b (b) ('40) Chitaley O. 1 R. 8, N. 21 Pt. 7.

(41) Mulla, Page 511 Pt. (r).

A. I. R. (29) 1942 Lahore 138

DALIP SINGH AND DIN MOHAMMAD JJ.

Shah Nawaz and another — Defendants
— *Appellants*

v.

*Ghulam Murtaza — Plaintiff —**Respondent.*

Second Appeal No. 1673 of 1939, Decided on 2nd December 1941, from decree of Dist. Judge, Jhang at Sargodha, D/- 27th July 1939.

c Transfer of Property Act (1882), S. 6 (a)—
Relinquishment of his spes successionis by heir-apparent is valid if it proceeds on settlement of conflicting claims or bona fide disputes—Mahomedan *M* dying leaving three sons—*G* claiming to be *M*'s legitimate son and suing for possession of his share—Under compromise *M*'s sons giving certain portion of property to *G* without admitting his claim—*G* agreeing not to press his claim as *M*'s son for share in *M*'s property nor in future claim as reversioner to *M*'s sons—On death of one of *M*'s sons *G* suing for share as reversioner of deceased son—*G* held estopped from claiming as reversioner—Compromise held not relinquishment of spes successionis but settlement of bona fide dispute between parties and hence was binding on *G*.

d On the death of a Mahomedan a dispute arose between three of his sons and another person *G* who asserted that he was the legitimate son of *M* and therefore entitled to an equal share of the property of *M* along with the three sons of *M*. *G*, therefore brought a suit for possession of his share. In that suit a compromise was arrived at between the parties by which the sons of *M* gave a certain portion of *M*'s property to *G* without admitting his claim which still remained disputed and it was further agreed that in consideration of receiving this property *G* would neither then press his claim as the son of *M* to a full share in *M*'s property nor would in future make his claim as a reversioner to the sons of *M* who also similarly agreed not to claim as reversioners on *G*'s death. On the death of one of the sons of *M*, *G* brought a suit for a share in the deceased son's property as his reversioner.

Held (Per *Dalip Singh J.*)—By reason of his accepting the compromise *G* was estopped from

claiming as a reversioner and could not in face of that compromise allege that he was the legitimate son of *M*. Hence no question arose as to whether *G*'s agreement to relinquish his future share in the brothers' property was or was not a relinquishment of a spes successionis : ('18) 5 A.I.R. 1918 P.C. 70, *Rel. on.* [P 139 C 2]

Per *Din Mohammad J.*—However illegal and unenforceable a bare relinquishment or renunciation of the chance of an heir-apparent succeeding to an estate may be that renunciation or relinquishment would be valid if it proceeds on a settlement of conflicting claims or bona fide disputes between the contracting parties. The dispute between *M*'s sons and *G* was a bona fide dispute. *G* could rightly apprehend that his legitimacy might not be established, the trial Court having found against him. If therefore to avoid an adverse decision on the factum of his legitimacy he entered into a compromise with the contesting sons of *M* and gained an immediate advantage for himself, it could not be said that he was relinquishing a mere chance of succession. Consequently, the agreement was valid and *G* could not contend that that agreement did not bind him : *Case law reviewed.* [P 142 C 1, 2]

Abdul Aziz — for Appellants.

Sheikh Mohammad Ameen and Mohammad Jamil — for Respondent.

DALIP SINGH J.—The facts of this case are that on the death of one Mohammad Bakhsh a dispute arose between three of his sons and another person Ghulam Murtaza by name who asserted that he was the legitimate son of Mohammad Bakhsh and therefore entitled to an equal share of the property of Mohammad Bakhsh along with the three sons of Mohammad Bakhsh. This person therefore brought a suit for possession of his share. In that suit a compromise was arrived at between the parties by which the sons of Mohammad Bakhsh, while not admitting and in fact denying that Ghulam Murtaza was the legitimate son of Mohammad Bakhsh, agreed that they would give him 1/12th in the khewat property left by Mohammad Bakhsh and 1/8th share in the shamilat appertaining to that khewat property in consideration of Ghulam Murtaza withdrawing his claim to an equal share in the property left by Mohammad Bakhsh and further agreeing that he would not claim as a reversioner to anyone of the three sons of Mohammad Bakhsh and the three sons of Mohammad Bakhsh would similarly not claim as reversioners on the death of Ghulam Murtaza. Thereafter one of the sons of Mohammad Bakhsh died and Ghulam Murtaza brought the present suit claiming 1/3rd share as a reversioner of the dead person, namely, Ghulam Rasul. The defendants again denied that Ghulam Murtaza plaintiff was the legitimate son of their father Mohammad Bakhsh and they relied on the compromise as estopping the plaintiff from raising the question of his being the legitimate son of Mohammad Bakhsh deceased. Various issues were framed by the trial Court which do not now concern us, but the learned trial Court held that the parties were governed by custom, that the plaintiff was not the legitimate son of Mohammad Bakhsh and that the plaintiff had relinquished all his rights under the agreement entered into by him and therefore could not now maintain the suit. It accordingly dismissed the plaintiff's suit with costs. On appeal learned District Judge held that the last issue in the case, namely, issue 5 "was a settlement arrived at between the parties whereby the plaintiff gave up his rights

and is the plaintiff estopped" raised an important question of law. He held that the relinquishment by Ghulam Murtaza of his reversionary rights in favour of his brothers was void under Mahomedan law as well as under customary law because Ghulam Murtaza had only a spes successionis at the time of the relinquishment and such a transfer was void and therefore the present suit was not barred by his previous renunciation which of course was established. He also held that the plaintiff had proved that he was the legitimate son of Mohammad Bakhsh. He, therefore, accepted the appeal and granted the plaintiff a decree for possession of one-third share in the land in dispute with costs throughout.

The defendants have come in second appeal and their learned counsel has contended that Ghulam Murtaza is estopped by reason of the compromise entered into in the prior suit. He has cited A.I.R. 1930 Lah. 928,¹ A.I.R. 1939 All. 689,² 40 All. 487,³ a Privy Council decision, A.I.R. 1925 Mad. 1043⁴ and A.I.R. 1932 Cal. 600.⁵ On the other hand, the learned counsel for the respondent has cited 174 I.C. 116,⁶ a Bombay case, A.I.R. 1933 Pat. 165,⁷ 41 Mad. 365,⁸ A.I.R. 1937 Pat. 280⁹ and 41 I.C. 361.¹⁰ It is unnecessary to go at length into these rulings for, the matter appears to me to be clearly concluded by their Lordships of the Privy Council's decision in 40 All. 487.³ The facts of that case were very similar to the present case in essentials though the case was one of Hindus. In that case one Kanhiya Lal had alleged that he was the heir of the property left by another person one Bahadur Mal deceased as against his widow and other persons because he was the adopted son and validly so adopted of that deceased person. In the suit which he brought the matter was referred by agreement to arbitration and an award was given by which the property of the deceased person was divided; one quarter to one widow, one quarter to Kanhiya Lal and one quarter and one quarter respectively to two other widows of the deceased person. In the award it was also stated that Kanhiya Lal would be precluded from claiming as a reversioner on the death of the widow as against her daughter or her other heirs. On the death of the widow, Kanhiya Lal brought a suit and their Lordships of the Privy Council pointed out that this was not a case of relinquishment of a spes successionis or an agreement to transfer his spes successionis but only raised the

question whether the acts of Kanhiya Lal in the compromise and the award following it did or did not act as an estoppel to bar him from claiming as a reversioner.

Their Lordships held on the facts of that case that the estoppel did prevent Kanhiya Lal from asserting his claim as a reversioner to the widow. The case seems to me entirely indistinguishable from the present case. Here too, the question whether Ghulam Murtaza was or was not the legitimate son of Mohammad Bakhsh was disputed. In the compromise a certain portion of the property was given to him without admitting his claim which still remained disputed and it was further agreed that in consideration of receiving this property Ghulam Murtaza would neither then press his claim as the son of Mohammad Bakhsh to a full share in his father's property nor would in future make his claim as a reversioner to the other sons of Mohammad Bakhsh. The estoppel therefore arises long before the point as to whether a transfer of a spes successionis is valid or invalid. By reason of his accepting the compromise, Ghulam Murtaza is now estopped from claiming as a reversioner. In other words he cannot now in face of that compromise allege that he is the legitimate son of Mohammad Bakhsh. Hence no question arises as to whether his agreement to relinquish his future share in the brothers' property was or was not a relinquishment of a spes successionis. He not being able to allege that he is a reversioner by reason of the fact that he is the legitimate son of Mohammad Bakhsh the point does not arise and therefore his suit must fail. I would, therefore, accept this appeal and dismiss the plaintiff's suit with costs throughout.

DIN MOHAMMAD J.—The facts have already been fully set forth in the judgment of my learned brother and need not be recapitulated. The sole question involved in this case is whether Ghulam Murtaza could go behind the agreement solemnly entered into by him with the three sons of Mohammad Bakhsh who resisted Ghulam Murtaza's claim to be also the legitimate son of Mohammad Bakhsh. The provisions of law which have been referred to in this connexion are (a) S. 6, T. P. Act and (b) para. 43 of Mulla's Mahomedan law. Section 6, T. P. Act, deals with the nature of the property that may be transferred and excludes from this category among other things "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature." Paragraph 43 of Mulla's Mahomedan Law lays down that the chance of a Mahomedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release. The parties in this case are admittedly governed by Customary law but it is conceded on both sides that these are the only provisions which govern the case.

So far as the absolute prohibition is concerned, there can be no doubt on the terms of the provisions of law set out above but there has been a dispute of long standing as to whether this bar applies when a reversioner in the circumstances existing in this case relinquishes his right. It is necessary therefore that this question may be considered at some length and the authorities dealing with the subject may be reviewed in order to find out whether the bar contained in these provisions is absolute or whether it can be relaxed in certain conditions. The earliest case cited before us is 17 W. R. 108¹¹ where

11. ('73) 17 W.R. 108 (P.C.), *Mt. Hurmut-ool-Nissa Begam v. Allahdia Khan*.

1. ('30) 17 A.I.R. 1930 Lah. 928 : 129 I.C. 29 : 31 P.L.R. 909, *Naranjan Singh v. Dharam Singh*.
2. ('39) 26 A.I.R. 1939 All. 689 : 184 I.C. 531 : I.L.R. (1939) All. 950 : 1939 A.L.J. 824 (F.B.), *Uma Shanker v. Ram Charan*.
3. ('18) 5 A.I.R. 1918 P.C. 70 : 47 I.C. 207 : 40 All. 487 : 45 I.A. 118 (P.C.), *Kanhai Lal v. Brij Lal*.
4. ('25) 12 A.I.R. 1925 Mad. 1043 : 38 I.C. 982 : 49 M.L.J. 296, *Kamaraju v. Venkatalakshmiipathi*.
5. ('32) 19 A.I.R. 1932 Cal. 600 : 138 I. C. 882 : 59 Cal. 859 : 55 C.L.J. 205, *Sashi Kantha Acharjee v. Promode Chandra Roy*.
6. ('38) 25 A.I.R. 1938 Bom. 121 : 174 I.C. 116 : I. L. R. (1937) Bom. 895 : 89 Bom. L. R. 1287, *Karusinga Kushansing v. Narsinha Rangrao*.
7. ('33) 20 A.I.R. 1933 Pat. 165 : 149 I.C. 491 : 14 P.L.T. 27, *Lalta Prasad v. Sarnam Singh*.
8. ('18) 5 A.I.R. 1918 Mad. 119 : 45 I.C. 35 : 41 Mad. 365 : 34 M.L.J. 460, *Asha Beevi v. Karuppan*.
9. ('37) 24 A. I. R. 1937 Pat. 280 : 168 I. C. 512, *Joti Lal Shah v. Beni Madho Prasad*.
10. ('18) 5 A.I.R. 1918 Mad. 743 : 41 I.C. 361, *Asa Beevi v. Karuppan Chetty*.

their Lordships of the Privy Council remarked that according to the Mahomedan law "there may be a renunciation of the right to inherit, and that such a renunciation need not be express, but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another." It may be observed that in some Courts this remark was interpreted to mean that their Lordships had stated that renunciation of a future right to inherit was possible under Mahomedan law, while in some cases this remark was explained to mean that a vested right alone could be renounced and, if I may say so with all respect, this appears to be the only proper construction that can be put upon their Lordships' remark in view of the circumstances of the case in which it was made. In 8 Cal. 138,¹² two brothers had agreed that the family property should be divided in certain shares. One of the brothers had acted both on his own account and as guardian of his minor brothers. He later resisted the agreement on the ground that it was invalid. The finding, however, was that there was a bona fide dispute as to the rights of the parties. A Division Bench of the Calcutta High Court repelled the contention put forward by the contesting brother and remarked that there was nothing in Hindu law which made illegal an agreement entered into by expectants to divide a particular property in a certain way on the happening of a particular contingency. It was further added that such an agreement was not contrary to public policy. It may be remarked that this judgment relates to a case instituted before the coming into force of the Transfer of Property Act.

In 24 All. 94,¹³ which relates to the year 1901, the plaintiffs claimed certain land on the death of the widow of the last male owner as his collateral heirs. A similar claim had been made before when the settlement of the estate with the widow was being made. An agreement was arrived at between the widow and the claimants and certain conditions laid down. Later, this position was repudiated. In this connexion, their Lordships of the Privy Council held that even assuming that the arrangement made by the Settlement Officer amounted to a contract between the then claimants and the widow, such a contract was not binding on the plaintiffs as they were only expectant heirs with spes successionis. In 31 Bom. 165,¹⁴ it was held by Sir Lawrence Jenkins C. J., and Beaman J. that the chance of an heir-apparent succeeding to an estate is under Mahomedan law neither transferable nor releasable. It was, however, added that it was only by an application of the principle that equity considers that done which ought to be done that such a chance can, if at all, be bound.

In 33 All. 457,¹⁵ a Mahomedan wife had brought a suit for dower against her husband which resulted in a compromise by which it was provided inter alia that on the death of the wife the persons who should be the heirs of both would be the owners of the properties, the possession of some of which was given to the wife and the possession of some retained by the husband for life. The wife predeceased her husband who then transferred certain properties in his own right and as heir of his wife. A dispute arose in this

connexion and it was held by a Division Bench of the Allahabad High Court that the compromise was in the nature of a family settlement under which the husband was not competent to dispose of more than the life interest in certain property therein named. The relinquishment by the husband of his right to succeed as heir to his wife was not obnoxious to the prohibition contained in S. 6 (a), T. P. Act. 17 W.R. 108,¹¹ 31 Bom. 165¹⁴ and 8 Cal. 138¹² were considered in this case.

In 41 I. C. 361,¹⁰ which again was a case under Mahomedan law, Sadasiva Aiyar J. and Spencer J. disagreed as to the principles applicable to the case of a relinquishment of expectancy by a Mahomedan. Sadasiva Aiyar J. observed that the relinquishment of his rights of inheritance by an heir-apparent was invalid under Mahomedan law, and in so far as the Mahomedan law prohibits relinquishment of right of future inheritance whether for consideration or not a declaration as to present or future intention about such relinquishment could not be relied on as an estoppel. Spencer J. on the other hand relying on the remark made by their Lordships of the Privy Council in 17 W. R. 108¹¹ referred to above held that a mere renunciation of a right of succession was not repugnant to the principles of Mahomedan law. He further held that where an heir-apparent renounced such a right by reason of an arrangement whereby he accepted a benefit and compounded for his share in the property, he or anyone claiming under him was estopped from repudiating the transaction by which he was benefited. It may be observed that this case went on appeal to a Bench of three Judges and they agreed with Sadasiva Aiyar J.: see 41 Mad. 365.⁸ The learned Judges while discussing 17 W. R. 108¹¹ observed that their Lordships of the Privy Council did not intend to lay down that a Mahomedan can renounce his right of inheritance before that right had become vested on the death of the person to whom he was entitled to succeed and that their observations should be taken to deal with a renunciation after the right of inheritance had vested. In 39 Mad. 554,¹⁶ it was observed that the Statute law of India forbade transfers of expectancy and consequently contracts to transfer them could not be enforced even when the estate fell into possession. The principles laid down in this case were approved by their Lordships of the Privy Council in 50 Cal. 929.¹⁷

In 40 All. 487,³ one Bahadur Lal died in 1833. Kanhai Lal claimed as a reversioner to Bahadur Lal who was by survivorship the sole owner of the family estate at the time of his death. On his death, Mt. Ram Dei became entitled to that estate for her life. Her title was, however, disputed by Kanhai Lal, Mt. Parbati and Mt. Kausilla, the widows of the two predeceased brothers of Bahadur Lal. Kanhai Lal set up a claim alleging that he had been adopted by Mt. Parbati to her deceased husband and was entitled to the whole estate as such adopted son. Each of the two widows, Mt. Parbati and Mt. Kausilla, asserted that the brothers had separated and claimed one-third of the family estate for life. In order to protect her own interest and that of her daughter Mt. Kirpo, Mt. Ram Dei contested these claims and brought two suits, one

12. ('82) 8 Cal. 138 : 10 C.L.R. 66, Ram Nirunjun Singh v. Prayag Singh.

13. ('02) 24 All. 94 : 29 I.A. 1 : 8 Sar 152 (P.C.), Bahadur Singh v. Mohar Singh.

14. ('07) 31 Bom. 165 : 8 Bom.L.R. 781, Sumsud-dia Goolam Husein v. Abdul Husein.

15. ('11) 33 All. 457 : 9 I.C. 530 : 8 A.L.J. 275, Nasirul Haq v. Fyazul Rahman.

16. ('16) 3 A. I. R. 1916 Mad. 579 : 29 I. C. 241 : 39 Mad. 554 : 28 M. L. J. 650, Lakshmi Narayana Jagannadha Raju v. Lakshmi Narasimma.

17. ('23) 10 A.I.R. 1923 P. C. 189 : 74 I. C. 499 : 50 Cal. 929 : 50 I. A. 259 (P. C.), Annada Mohan Roy v. Gour Mohan Mullick.

of which was dismissed on a technical ground but
 a was pending in the High Court on appeal. Before the second suit came on for trial, all the contestants entered into a compromise by which all their disputes were referred to arbitration. Under the awards of the arbitrator, one-fourth was allowed to each of the four ladies. As regards Kanhai Lal, it was remarked that he had been adopted by Mt. Parbati and had nothing to do with the properties of other ladies as 'such adopted son, nor had he any claim to the property. By the agreement of compromise and the awards, Kanhai Lal got no share in the family property but in fact he got one-fourth share which was allotted to Mt. Parbati and he further obtained the benefit of having the validity of his adoption by Mt. Parbati left undecided by a Court of law. Before their Lordships of the Privy Council, it was contended that this compromise could not be enforced as it involved a transfer of the chance of an heir-apparent succeeding to an estate and in this connexion 31 Bom. 165¹ was relied on. Their Lordships of the Privy Council distinguished that case on the ground that there was no question before them of a conveyance or of an agreement to convey, any future right or expectancy or of an agreement to relinquish any future right or expectancy. The only question involved was whether Kanhai Lal had not by his acts debarred himself from ever claiming as a reversioner and this question they decided against him holding that being a party to the compromise he could not repudiate it afterwards.

In 45 Cal. 590¹⁸ their Lordships of the Privy Council observed that a Hindu reversioner had no right or interest *in presenti* in the property which the female owner held for her life; until it vested in him on her death should he survive her, he had nothing to assign or to relinquish or even to transmit to his heirs. His right became concrete only on her demise; until then it was a mere *spes successionis* and that right could not be bargained by any contractual engagement. In 48 Cal. 536¹⁹ one Mr. Seal died intestate leaving him surviving two widows and five nephews. The estate left by him vested in the two widows. A will was set up which was held to be a forgery in the course of the litigation. One of the nephews agreed to convey to the plaintiff for consideration his interest in the estate of his maternal uncle. In a suit for specific performance of this agreement it was urged that the contract was void, illegal and unenforceable. Sir Asutosh Mookerjee Ag. C. J. after referring to all the cases bearing on the point, some of which have been referred to above including 40 All. 487³ observed as follows:

a "We must accordingly take it as settled by the decisions of the Judicial Committee that the interest of a Hindu reversioner is an interest expectant on the death of a qualified owner; it is not a vested interest, it is a *spes successionis* or a mere chance of succession, it cannot be sold, mortgaged, assigned or relinquished, for a transfer of a *spes successionis* is a nullity and has no effect in law. But though a transfer of his interest by a reversioner is void, he may, by becoming a party to a compromise and by taking the benefit of the compromise, be estopped from claiming as a reversioner."

18. ('17) 4 A.I.R. 1917 P. C. 95 : 44 I. C. 408 : 45 Cal. 590 : 45 I. A. 35 (P. C.), Amrit Narayan Singh v. Gaya Singh.

19. ('21) 8 A. I. R. 1921 Cal. 501 : 65 I. C. 27 : 48 Cal. 536 : 33 C. L. J. 457, Annada Mohan Roy v. Gour Mohan Mullick.

In 45 All. 173²⁰ a Hindu obtained a decree declaring that a will on which the widows of the last holder based their authority to adopt was invalid. Prior to that event, however, he purported to sell half the estate for consideration declaring that when he succeeded he would put the vendor in proprietary possession. After the death of the last surviving widow, the representative of the purchaser sued the vendor for possession. It was held by their Lordships of the Privy Council that there was no effectual transfer of the estate since the vendor had only an expectancy. In A. I. R. 1925 Mad. 1043¹ it was observed that though a reversioner in expectancy could not validly contract to transfer his *spes successionis* when the reversioner entered into possession, he could relinquish his right to say that the properties in dispute formed part of the estate to which he was the reversioner. Srinivasa Iyengar J. observed:

"In all such cases when the question arises whether the transaction was really a relinquishment of a *spes successionis* or a bona fide compromise of disputed rights, it seems to me that the best thing to do would be to look at the substance of the transaction, apart altogether from any form which might have been given to it. If in substance the transaction is found to be only a dealing with the *spes successionis*, then, of course, it cannot be recognized and cannot form the basis of any binding obligation. But if, on the other hand, the substance of the transaction is found to be a bona fide settlement between the parties, then, in spite of the fact that the same transaction might be represented in one of its aspects as a dealing with a *spes successionis*, it is nonetheless a real compromise of disputed rights."

In 10 Lah. 613²¹, S. G (a), T. P. Act, was held applicable to the transfer by a reversioner of his chance of inheritance. In A. I. R. 1930 Lah. 928¹ Broadway and Currie JJ. after referring to 50 Cal. 929¹⁷ remarked that in the Punjab a sale of a reversionary right of succession though at the time of the sale it did not affect a transfer of property gave rise to a right which the Court would enforce when the inheritance fell into possession. This distinction the learned Judges drew mainly on the ground that the Transfer of Property Act was not in force in the Punjab and that their Lordships of the Privy Council had themselves remarked in 50 Cal. 929¹⁷ that the law in England was different and that this was the state of the law in India prior to the enactment of the Transfer of Property Act. In this matter the learned Judges followed a previous decision of the Chief Court as well as a previous decision of this Court. In A. I. R. 1932 Cal. 600⁵ most of the authorities of their Lordships of the Privy Council as well as of the High Courts in India referred to above were considered and after a full discussion of the principle enunciated by them it was observed:

"On reading these decisions with care it seems to us that if there is one principle that follows from all of them unmistakably it is this that the arrangement must be one concluded with the object of settling bona fide a dispute arising out of conflicting claims to property which was either existing at the time or was likely to arise in future. Bona fides are the essence of its validity and from this it follows that there must be either a dispute or at least an apprehension of a dispute, a situation of contest which is

20. ('22) 9 A.I.R. 1922 P. C. 403 : 71 I. C. 629: 45 All. 179: 26 O. C. 223: 50 I. A. 69 (P.C.), Harnath Kunwar v. Inder Bahadur.

21. ('29) 16 A. I. R. 1929 Lah. 295 : 118 I. C. 449: 10 Lah. 613 : 30 P. L. R. 328, Thakar Singh v. Mt. Uttam Kaur.

avoided by a policy of giving and taking or else all transfers or surrenders will pass under the cloak of a family arrangement."

In this case reference was further made to 48 Cal. 100²² and 5 Pat. 290²³ as well as to 52 Bom 124. In A. I. R. 1933 Pat. 165, 7 a Division Bench of the Patna High Court after considering all the authorities relevant to the point remarked that S. 6 (a) did not strike at agreements by expectant heirs such as an agreement to divide a particular property in a certain way on the happening of a particular contingency and for this proposition placed their reliance on 33 All. 457.¹⁵ It may, however, be remarked that the agreement under consideration in that case had been entered into prior to the coming into force of the Transfer of Property Act and on this aspect of the case Kulwant Sahay J. who delivered the principal judgment observed that an agreement involving the transfer of a chance of succession was, after the enactment of the Transfer of Property Act, bad in law. In A.I.R. 1937 Pat. 280,⁹ an agreement by which one reversioner sold his interest in the estate to another reversioner in consideration of a payment of certain sum annually to him or an undertaking by him in consideration of that payment not to make a claim to that estate was held to be bad in law. It appears, however, that the agreement was not considered to be a family arrangement as it had been entered into by only two members of the family. In 174 I. C. 116,⁶ a Hindu died leaving behind him a widow and a daughter. The widow succeeded to a life estate and the daughter executed a deed of relinquishment in her favour by which she relinquished all her right in the property in consideration of her getting a portion of the property from the widow. A Division Bench of the Bombay High Court held that the transaction came within the mischief of S. 6 and was consequently invalid. In A.I.R. 1939 All. 639,² a Full Bench of the Allahabad High Court approvingly referred to the remarks made by Srinivasa Iyengar J. in A.I.R. 1925 Mad. 1043¹ and observed: "The bare transfer of such interest as he had therefore was void. This, however, does not necessarily conclude the matter. If the transfer was a part and parcel of a family settlement or a compromise in a dispute between rival claimants to property it would not necessarily be invalid."

From a review of these authorities, the only conclusion that can be deduced is that however illegal and unenforceable a bare relinquishment or renunciation of the chance of a heir-apparent succeeding to an estate may be, different considerations prevail if that renunciation or relinquishment proceeds on a settlement of conflicting claims or bona fide disputes between the contracting parties. In the present case, it is obvious that the three sons of Mohammad Bakhsh were not prepared to acknowledge the claim put forward by Ghulam Murtaza that he was also a legitimate son of Mohammad Bakhsh. In the compromise as well as in the statements made by the contesting brothers, it was emphasized that the property that was being delivered to Ghulam Murtaza was by way of a gift and

that they did not in so doing acknowledge that he was a legitimate son of Mohammad Bakhsh. There was a dispute, therefore, and for that matter a bona fide dispute. Ghulam Murtaza could rightly apprehend that his legitimacy might not be established. It is significant that even in the present case the trial Court had found against him. If, therefore, to avoid an adverse decision on the factum of his legitimacy he entered into a compromise with the contesting sons of Mohammad Bakhsh and gained an immediate advantage for himself, it could not be said that he was relinquishing a mere chance of succession. Consequently, the agreement relied upon by the appellants was valid and Ghulam Murtaza could not in the present suit contend that that agreement did not bind him. I agree, therefore, that the appeal should be allowed and that Ghulam Murtaza's suit be dismissed with costs throughout.

G.N./R.K.

Appeal allowed.

T. P. Act —

(36) Mulla, S. 6 Page 51, N. 5 and N. 7; see Page 52 Pt. (w); Page 54 Pts. (J) and (k).

(37) Mitra, S. 6 Page 42, N. 42; Page 45, N. 45.

A. I. R. (29) 1942 Lahore 142

DALIP SINGH AND SALE JJ.

Diwan Ghulam Rasul — Plaintiff — Appellant

v.

Ghulam Qutab-ud-Din — Defendant — Respondent.

First Appeal No. 93 of 1939, Decided on 6th May 1941, from decree of Sub-Judge, First Class, Montgomery, D/- 2nd December 1938.

(a) Mahomedan law—Wakf—Sajjada Nashin — Shrine of Hazrat Baba Farid at Pak Pattan District Montgomery — Custom to nominate successor though minor if Murid and of agnatic descent from founder upheld—Custom of selection by descendants of Shah Ala-ud-Din Mauj Darya rejected.

The question of succession to the office of Sajjada Nashin of the shrine of Hazrat Baba Farid at Pak Pattan, District Montgomery (which is founded on the principles of sufism) is regulated by custom and usage. According to the custom of this shrine a Sajjada Nashin has the power to nominate a successor provided he is a Murid and of agnatic descent from the founder Hazrat Baba Farid (22 Cal. 324 (P.C.), *Rel. on.*). There is no bar to the nomination of a minor. The custom that the descendants of Shah Ala-ud-Din Mauj Darya have the right to reject a nomination or to select a candidate themselves was rejected.

[P 144 C 2; P 146 C 2; P 147 C 1]

(b) Mahomedan law—Wakf—Sajjada Nashin — Nomination of, by death-bed will is strong piece of evidence for nominee.

A death-bed nomination is a strong piece of evidence in favour of the nominee, even according to Mahomedan law which does, under certain circumstances, recognise the validity of the appointment of a minor to the mutwalliship of a mosque or shrine.

[P 144 C 2]

(c) Evidence—Book accepted by Privy Council as authoritative — Copy of issue of same edition produced in subsequent suit held should be accepted.

22. (21) 8 A.I.R. 1921 P.C. 107 : 57 I.C. 325 : 48 Cal. 100 : 47 I.A. 233 (P.C.), Sureshwar Misser v. Mt. Maheshwari Misrani.

23. (26) 13 A. I. R. 1926 P.C. 2 : 94 I. C. 830 : 5 Pat. 290 : 53 I. A. 11 (P. C.), Maunsingh v. Nawalakhbati.

24. (27) 14 A.I.R. 1927 P. C. 227 : 105 I. C. 708 : 52 Bom. 1 : 54 I. A. 396 (P.C.), Ramgowda Anna-gowda v. Bhau Sahab.

The Privy Council accepted as authoritative the Persian edition of the Jowahar Faridi. Not the same copy but a copy of the same which was an issue of the same edition was produced in a subsequent suit :

Held that the printed edition of that year should be accepted in the case. [P 147 C 1]

(d) Mahomedan law—Wakf—Sajjada Nashin — Dastar bandi is not root of title.

The dastar bandi ceremony itself is not a root of title as it is not a ceremony of selection but it is a ceremony of installation : 1938 O. W. N. 1157, *Rel. on.* [P 147 C 2]

Sir Wasir Hassan, C. S. Saran and Shamair Chand — for Appellant.

Barkat Ali and Nazeer Ahmed Mahmood for Shaukat Ali — for Respondent.

SALE J. — This appeal arises out of a suit by Diwan Ghulam Rasul claiming succession to the office of Sajjada Nashin of the shrine of Hazrat Baba Farid situate at Pak Pattan in the Montgomery District, together with possession of the shrine and of the valuable properties appertaining thereto. On the death on 26th December 1934 of Diwan Said Mohammad, the 24th holder of the office of Sajjada Nashin, he was succeeded by the present defendant, Diwan Qutab-ud-Din. Born in 1923 and recognised by Diwan Said Mohammad as his son by a second wife, Qutab-ud-Din was while still a minor nominated by the father as his heir and successor by virtue of a testamentary document dated 8th March 1933, (and later confirmed as such by an alleged death-bed will dated 24th December 1934) and on the strength of this nomination, he assumed the office of Sajjada Nashin and possession of the shrine and its properties on the death of his father. He is now 18 years of age. His accession led to the institution of this suit by Diwan Ghulam Rasul to contest the right of Diwan Qutab-ud-Din to succeed to the office of Sajjada Nashin and the properties appertaining thereto and to establish his own claim. The pedigree table Ex. D.3 printed at p. 130 of Vol. 5 illustrates the relationship of the parties. It is common ground that the question of succession to the office of Sajjada Nashin of this shrine is regulated by custom and usage. The defendant has succeeded to the office on the strength of an alleged custom by which the previous holder had the right to nominate his successor. The plaintiff has contested the validity of this nomination on various grounds, the most important of which are that Diwan Qutab-ud-Din was not the legitimate son of Diwan Said Mohammad, that he was a minor, that the late office holder received no revelation in his favour and that his appointment has never been approved by the Baradari. By the expression 'Baradari' the plaintiff refers to the descendants of the third Sajjada Nashin viz., Shah Ala-ud-Din Mauj Darya. On the other hand, the plaintiff contends that he was validly selected as the Sajjada Nashin by this Baradari, which, according to him, has by usage, the right to approve or reject any nomination made by the last holder and in the last resort itself to select a successor.

A description of this important shrine at Pak Pattan and of its founder Hazrat Baba Farid who died in A. H. 664 (corresponding to 1265 A. D.) will be found at pp. 65 to 67 of the revised 1933 edition of the District Gazetteer of the Montgomery District. It is contended on behalf of the defendant and not denied for the plaintiff that succession to the Sajjada Nashini of such shrines, is not, like the mutt-

wallship of a mosque, regulated by the strict application of Mahomedan law. These shrines, founded as they are on the principles of sufism, are governed by the custom or usage appertaining to the institution. As pointed out by Agha Haider J. in 14 Lah. 558¹ at p. 563 : "In determining the usage regarding the succession to the office of Sajjada Nashin one should approach the subject from the point of view of sufism, its doctrines, and its teachings." In this judgment the learned Judge has dealt with the doctrines of sufism which apply to all such shrines and the position of a Sajjada Nashin and has pointed out how the opinion of the last Sajjada Nashin in regard to his successor would naturally carry great weight and will be respected by all persons interested in the institution. I cite this authority in order to make it clear that in dealing with this case the proper method of approach is to consider the usage of the institution according to the doctrines of sufism rather than to apply the strict principles of Mahomedan law.

The issues framed by the trial Court are summarised on pp. 249 to 251 of the judgment under appeal printed at p. 246 of Vol. III. The issues material to this appeal are issues 3, 4, 5, 6, 7, 11, 12, 13 and 14. Issues 3, 4 and 5 deal with the custom relating to the succession to the office of Sajjada Nashin, and in this connexion the defendant's case is that the last holder has the absolute power to nominate his successor subject only to two restrictions, (1) that his nominee should be a Murid or worshipper and (2) that he should be related in agnatic descent from Baba Farid the founder. Provided these two qualifications apply, the defendant contends that the last holder has the right to nominate even a minor as has been done in the present case and that no "revelation" is necessary. At the same time, according to the pleadings in this case, the defendant contends that he was in fact appointed as a result of the "revelation" duly communicated by the last holder. On the other hand the plaintiff while admitting that great weight would naturally attach to the wishes of the last holder in the matter of succession contends that the ultimate approval must rest by custom with the "Baradari" who have the right not only to select a successor but also to reject a nomination which they may consider unsuitable. In the present case while not denying that the last holder did nominate the defendant by a testamentary document dated 8th March 1933 it is contended that the nomination is invalid because the defendant was a minor and because there was no revelation; and the plaintiff rests his title to the office on the fact that he was duly elected successor by the Baradari consisting of the descendants of Shah Ala-ud-Din Mauj Darya.

It is further contended that there was no revelation in favour of the defendant and that his nomination is void not only on the ground of his minority but because he is not in fact the legitimate son of the last holder. Issue 14 relates to a second testamentary document executed by Diwan Said Mohammad while on his death-bed on 24th December 1934 wherein he inter alia confirmed the nomination of the defendant as his successor and heir. The validity of this will was questioned by the plaintiff in the pleadings on the ground that Diwan Said Mohammad was not of sound disposing mind. The findings of the trial Court are wholly in favour of the defendant except in regard to this will of

1. (133) 20 A. I. R. 1933 Lah. 905 : 144 I. C. 636 : 14 Lah. 558 : 34 P.L.R. 863, Ghulam Mohammed v. Abdul Rashid.

24th December 1934. The learned Subordinate Judge has rejected this will not only because he thinks that (in spite of the plaintiff's admissions in the pleadings) the execution is not proved, but also because he has held that Diwan Said Mohammad was not of sound disposing mind at the time of its execution. For the rest he has held that the custom propounded by the plaintiff is not established. On the other hand, he has found that the custom propounded by the defendant is established viz., that the last holder has the power to nominate as his successor a person who is related to him as an agnate and who is a Murid, both of which qualifications admittedly apply to the defendant in this case; and that, according to the usage of the shrine, the nomination of a minor who fulfils these conditions, is valid. He has held further that the legitimacy of the defendant, Qutab-ud-Din, has been established, that Diwan Said Mohammad did make the nomination as a result of a "revelation" which was duly communicated; and lastly, he has rejected the custom propounded by the plaintiff that the descendants of Shah Ala-ud-Din Mauj Darya have a right either to question or to reject a nomination made by the last holder.

In the course of his arguments, Sir Wazir Hassan for the appellant did not contest the finding that the defendant had been nominated by the last holder as his successor by means of a testamentary document dated 8th March 1933. As regards the legitimacy of the defendant, Sir Wazir Hassan while not willing to concede that it had been established, did not address to us any arguments to question the finding of the trial Court in favour of the legitimacy. Nor did he lay any stress in his arguments on the question of the factum or necessity of the grant of a "revelation" to the last holder, as a condition precedent to a valid nomination. Sir Wazir Hassan frankly conceded that it is not the province of a civil Court to decide whether a particular Sajjadanashin has received a revelation from the founder. All the Court can do is to decide the question of fact viz., whether the Sajjadanashin has or has not communicated the revelation to his followers. On this point the evidence is admittedly conflicting and of little value. The points which Sir Wazir Hassan laid stress in the course of his arguments were: (1) That the trial Court was right in rejecting the death-bed will of 24th December 1934; (2) that the trial Court was wrong in holding that Diwan Said Mohammad the last holder could validly nominate a minor; and (3) that on the evidence of custom and usage as adduced, the Court should reject the custom propounded by the defendant but should accept the custom propounded by the plaintiff in favour of selection or election by the Baradari consisting of the descendants of Shah Ala-ud-Din Mauj Darya. He asked the Court to reject the defendant's title and to find that the plaintiff was validly selected by this Baradari.

In dealing with the evidence on the question of custom, Sir Wazir Hassan while admitting that this case is not governed by strict Mahomedan law contended that where there is a conflict of evidence the Court should lean towards the acceptance of the evidence which is more in consonance with the tenor of Mahomedan law, that the nomination in this case by Diwan Said Mohammad while in good health by means of the testamentary document of 8th March 1933 of a minor, being utterly inconsistent with Mahomedan law should be rejected in the absence of very strong evidence of custom and usage in its favour (which he contends does not exist in this case) and that having

for this reason rejected the defendant's case the Court should find for the plaintiff, without requiring any strong evidence in favour of the plaintiff's custom since, he contends, the system of selection by the Baradari is recognised by Mahomedan law.

The general criticism I would make of this argument is that it overlooks the fact that the onus is on the plaintiff to prove his case in order to dispossess the defendant. Moreover, the learned Subordinate Judge was, in my view, wrong, for reasons that will appear later, in rejecting the death-bed will of 24th December 1934. This will is, as I shall show, valid. The result is that the defendant has in his favour a death-bed nomination which while, not perhaps, conclusive—since he was at the time only about 11 years of age—will certainly be a strong piece of evidence in his favour, even according to Mahomedan law, which does, under certain circumstances, recognise the validity of the appointment of a minor to the mutwalliship of a mosque or shrine. Before however dealing with the evidence it will be convenient to recapitulate certain material facts.

The last (and 24th) holder of the office of Sajjadanashin Diwan Said Mohammad himself succeeded to the office of Sajjadanashin while a minor by reason of a nomination by the previous Sajjadanashin Diwan Allah Jowaya the 23rd holder of that office to whom he was related as a daughter's son. This succession was upheld as the result of litigation instituted by Sheikh Abdul Rahman son of Sheikh Mohammad who on the death of Diwan Allah Jowaya had assumed the office of Sajjadanashin and possession of the shrine with its property but was ousted on the suit of Diwan Said Mohammad. This suit was decreed in Diwan Said Mohammad's favour by the District Judge of Montgomery on 28th April 1888. The judgment is printed at p. 12 of Vol. 5. This decision was reversed on appeal to the Chief Court on a point not now material but the decision of the Chief Court was itself reversed by their Lordships of the Privy Council who reaffirmed the decision of the District Judge in favour of Diwan Said Mohammad. The judgment of their Lordships is cited as 22 Cal. 324.² It may be mentioned that during the course of this litigation the defendant Sheikh Abdul Rahman died and his son Sheikh Fateh Mohammad was impleaded as his legal representative. Their Lordships of the Privy Council found that Diwan Said Mohammad had been validly nominated by the previous holder Diwan Allah Jowaya (a fact which is of great importance in the present case), and that according to the custom of this shrine a Sajjadanashin has the power to nominate a successor provided he is a Murid and of agnatic descent from the founder Hazrat Baba Farid. In the present case the son of Diwan Said Mohammad the last holder who was successful before the Privy Council in 1894, has succeeded to the Gaddi according to the custom held good by their Lordships, and his claim is now contested by the grandson of Sheikh Abdul Rahman who was the unsuccessful plaintiff in the previous litigation.

It may be mentioned here that the trial Court while rejecting the contention of the defendant that this decision operates as *res judicata* between the parties has held this decision to be a very important piece of evidence in favour of the custom now propounded by the defendant. That the decision of their Lordships of the Privy Council in the

2. (195) 22 Cal. 324 : 22 I. A. 4 : 8 Sar. 515 (P.C.).
Sayad Muhammad v. Fattah Muhammad.

previous case does not operate as *res judicata* is accepted as correct before us; but Sir Wazir Hassan has attempted in arguments to dislodge this judgment from the position of importance given to it by the lower Court on the ground that their Lordships did not consider the fact that Diwan Said Mohammad on his appointment was a minor and were (with all due respect) misled by the omission of counsel then appearing for the plaintiff, to contest the nomination on the ground of Diwan Said Mohammad's minority. Diwan Said Mohammad continued in office till his death on 26th December 1934. In 1923 the defendant Qutab-ud-Din was born and recognized by Diwan Said Mohammad as his son. His legitimacy was questioned in the lower Court but has been held to have been proved and this decision, while not admitted to be correct, is not contested in arguments before us. It is not, therefore, necessary to consider the evidence on the subject of his legitimacy. Suffice it to say that I have no hesitation on this evidence in accepting the decision of the trial Court that the legitimacy of Diwan Qutab-ud-Din has been established.

Admittedly, Diwan Qutab-ud-Din was, in 1931, made a Murid. According to the defendant's evidence this selection followed a revelation granted to the father by the founder. In 1932 Qutab-ud-Din was made a Khalifa, that is to say, he was himself given the authority of making Murids. On 8th March 1933, he was formally nominated as his successor to the office of Sajjada Nashin by Diwan Said Mohammad by virtue of a testamentary document exhibited as D-1, printed at p. 76 of Vol. 5. Diwan Said Mohammad was in good health when he made this declaration and by virtue of this document declared Qutab-ud-Din to be his successor as well as his heir. The factum of nomination by this document is not now contested though its validity was questioned on the ground that Diwan Said Mohammad had no power to make a nomination of a minor while in good health. This contention, however, now loses its force in the face of our finding in favour of the validity of the death-bed will of 24th December 1934, by which this nomination was confirmed. Later in the year 1933, certain ceremonies were performed by Diwan Said Mohammad in token of the nomination of Diwan Qutab-ud-Din as his successor.

On 24th December 1934, while on his death-bed Diwan Said Mohammad made a second will, exhibit D. W. 137/1, printed at p. 89 of Vol. 5. The main object of this will appears to have been to provide for his first wife, Mt. Wilayat Begum and her issue consisting of daughters but he mentions in this will that he had previously nominated as his successor and heir Qutab-ud-Din, a son by his second wife Mt. Ilahi Jan Begum and he takes the opportunity to confirm this nomination. I shall have occasion later to deal with the subsequent history of this will when considering its validity. On 26th December 1934, Diwan Said Mohammad died and on the third day, that is, on 29th December the 'Kul' ceremony took place. It is only necessary to mention this fact here because the plaintiff originally contended that it was on the occasion of the 'Kul' ceremony that he was selected by the Baradari, as the successor.

On 1st February 1935, there took place in the shrine, the "Dastar Bandi" ceremony of the defendant, Qutab-ud-Din in formal token of his succession as Sajjada Nashin. A few days previously, that is on 27th January 1935, a similar Dastar Bandi ceremony had been performed by a dissident faction consisting of certain descendants of Shah Ala-ud-

Din Mauj Darya in favour of the plaintiff although by reason of a prohibitory order issued by the district authorities under S. 144, Criminal P. C., this ceremony had to take place outside the shrine at the house of the plaintiff, Ghulam Rasul. On this date, these dissidents executed a declaration, Ex. P. 2, printed at p. 35 of Vol. 4, declaring that Diwan Said Mohammad could not nominate his successor without their consent and formally appointing as Sajjada Nashin the plaintiff. It may be noted in this connexion that this document makes no mention of the alleged election of the plaintiff on the 'Kul' day, viz., 26th December 1934 but recites that it was from the day of the execution of this document, that is 27th January 1935, that Diwan Ghulam Rasul has been selected and appointed to discharge the duties of Sajjada Nashin. On 6th April 1935, this suit was instituted by Diwan Ghulam Rasul and during the course of the litigation the superintendence of the property belonging to the shrine, was assumed by the Court of Wards.

I propose first to discuss the validity of the will executed by Diwan Said Mohammad while on his death-bed on 24th December 1934. The learned Subordinate Judge in giving reasons on pages 290 to 293 of his judgment for rejecting this will appears to have been considerably influenced by the fact that the will though executed on 24th December 1934 was not filed in Court until 7th July 1938. The delay is easily explained. The main beneficiary under this will was Mt. Wilayat Begum and it was ultimately from her possession that this will was produced by the manager of the Court of Wards who has appeared as D. W. 137. It seems that after execution, this will remained with Lala Nand Lal as recited therein and Lala Nand Lal, who has appeared as a witness, explained that he handed it over to Mohammad Hassan, brother of Diwan Said Mohammad, who presented it for registration on 19th January 1935. Mohammad Hassan in his evidence has explained that thereafter he handed the will to Mt. Wilayat Begum as the principal beneficiary and Khan Sahib Abdul Rehman, Manager of the Court of Wards as D. W. 137, formally produced the will in Court on 7th July 1938 which, he said, he had obtained from Mt. Wilayat Begum. The cause of delay in production of this document was undoubtedly the disinclination of Mt. Wilayat Begum to part with it, and it would seem that it was only as a result of the pressure brought upon her through the Court of Wards that she consented to give it up. These considerations have been overlooked by the learned Subordinate Judge; and it is clear that in these circumstances no inference adverse to the defendant can be drawn from the late production of this will. [His Lordship then discussed evidence, and holding that the will was proved proceeded.] The position, then, is that we have established a death-bed nomination of Diwan Qutab-ud-Din made by the last holder. Sir Wazir Hassan is not, however, prepared to admit that death-bed nomination of a minor as successor is in accordance with the custom of the shrine.

It is conceded that according to Mohammadan Law, a mutwali can nominate a successor on his death-bed and there is ample authority for the proposition that the nomination of a minor in such circumstances would be valid, if envisaged in the scheme of succession recognized by the founder of the institution. But reliance is placed by Sir Wazir Hassan on pages 443 and 445 of Syed Ameer Ali's Mohammadan Law Vol. 1, Edn. 4 for the proposition (based on the *Fatawa-i-Alamgiri*) that it is a

condition to the validity of the appointment of a Mutwalli that he should be adult and possessed of understanding. The learned author in his own judgment, cited as 19 Cal. 203,³ has also laid it down that the appointment of a child of tender years as Sajjada Nashin would seem to be opposed to the constitution of the office. It may be mentioned, however, that 19 Cal. 203³ was not dealing with a case of succession to a shrine governed by the doctrines of Sufism and that the observations were from this point of view obiter since the case dealt with the application of the principles of Mohammadan law. Here we are concerned with the custom of this particular shrine and the question for consideration is whether it has been established that according to this custom a minor can be appointed.

In this connexion the most important instance of such a custom is, as has been pointed out by the trial Court, the decision of their Lordships of the Privy Council in the case of the succession by Diwan Said Mohammad himself. Admittedly Diwan Said Mohammad was a minor when he succeeded on the nomination of his uncle, the last holder Diwan Allah Jowaya. Sir Wazir Hussain has endeavoured to distinguish this instance on the ground that Diwan Said Mohammad's case was that of a death-bed nomination and counsel then appearing did not think it worth while to contest the validity of the appointment of a minor in such circumstances. It is by no means clear, however, that Diwan Said Mohammad was nominated by Diwan Allah Jowaya on his death-bed. At page 266 of his judgment, under appeal the learned Subordinate Judge says that it was not a case of death-bed nomination. It appears from the judgment of the District Judge in the previous litigation that the document by which Diwan Said Mohammad was nominated was executed some six weeks after Diwan Allah Jowaya fell ill but it was six months before Diwan Allah Jowaya died and there is a mention in the judgment that subsequently certain ceremonies were performed by Diwan Allah Jowaya in token of the nomination of Diwan Said Mohammad as his successor. It is possible, therefore, that Diwan Allah Jowaya after making his will rallied before his death and in these circumstances it is by no means clear that Diwan Said Mohammad's nomination was made on Diwan Allah Jowaya's death-bed. Be that as it may, this aspect of the matter was not considered in the previous litigation, and the question of Diwan Allah Jowaya's condition at the time of the nomination was only considered by their Lordships of the Privy Council in regard to the circumstance whether he was then of a sound disposing mind and it was held that he was of a sound disposing mind. It is clear that in the previous case no objection was taken to the nomination of Diwan Said Mohammad on the ground of his minority nor was any effort made to show that the appointment was valid only because it was made by Diwan Allah Jowaya on his death-bed. The appointment of Diwan Said Mohammad was upheld solely on the ground that according to the usage of the shrine the Sajjada Nashin can nominate his successor provided he is of agnate descent from the founder and a Murid. In the present case the defendant, Diwan Qutab-ud-Din fulfils both these qualifications. The case for the validity of his appointment appears to me to be stronger than the case of his predecessor Diwan Said Mohammad because it is now clearly established that Qutab-ud-Din was nominated by Diwan Said Mohammad on his death-bed.

³ (192) 19 Cal. 203, Piran v. Abdool Karim.

It may be mentioned here that no attempt has been made before us to question the competence or ability of the defendant, who is now 18 years of age, in the matter of the performance of the duties attaching to the office of Sajjada Nashin. It has been argued by Mr. Barkat Ali that even in strict Mohammadan law there is no absolute bar to the appointment of a minor. All authorities appear to agree that if the scheme established by the founder envisages the appointment of a minor, it is permissible. In the case of this shrine, no such scheme is in existence. But it is common ground that the question must be determined by the usage of the shrine and if the usage permits the appointment of a minor, such appointment will be valid. A strong instance in favour of the defendant is the succession of Diwan Said Mohammad himself upheld by their Lordships of the Privy Council but this is not the only instance quoted in this case. On pages 282 to 286 of his judgment, the learned Senior Subordinate Judge has collected a number of instances proved in evidence in which a minor's succession has been recognised in the case of certain subsidiary shrines. Some of these instances are perhaps not clear because they may illustrate the right of a minor to succeed by inheritance rather than by nomination pure and simple. But the instances on which according to Mr. Barkat Ali for the respondent, reliance may be placed, are as follows :

(1) The shrine of Kalian Sharif, District Rawalpindi where according to the evidence of S. Maula Bakhsh, Sajjada Nashin, printed at p. 1 of Vol. 3, (D. W. C/173), Sain Mohammad Sarwar was nominated as a minor.

(2) The shrine of Chachran Sharif where one of the Sajjada Nashins was a minor as proved by Pir Rahim-ud-Din, (D. W. C/181) printed at page 50 of Volume 3.

(3) The case of Piran Kalairan where Shah Alu Al Hassan was nominated Sajjada Nashin as a minor.

(4) An instance from a shrine at Ahmedabad (Gujrat) where one Nasir Mian was appointed Sajjada Nashin as a minor. This is proved by the evidence of Sayyad Nisar Ahmad, mutwalli of the shrine (D. W. C/185), question 14 of his interrogatories printed at p. 94, Vol. 3.

(5) Five instances are quoted by Sahibzada Ghulam Min-ud-Din, Sajjada Nashin of Golra Sharif, Rawalpindi District, whose evidence taken on commission is printed at pp. 69 and 70 of Vol. 3. These instances, however, are not within the personal knowledge of the deponent but were taken from certain historical books the authoritative value of which may be open to question and at least in one of the instances given, viz., that of Hazrat Burhan Din quoted from the Jowahar Faridi p. 279 the rule of succession may have been that of inheritance. I see no reason, however, to doubt the reliability of the instances, collected from subsidiary shrines cited as Nos. 1-4 above. The other instances quoted on behalf of the defendant relate to the Pak Pattan shrine itself and are that of Shah Ala-ud-Din Mauj Darya and of Diwan Sheikh Mohammad known as "the second" and of Diwan Munawar Shah. Reference in this connection may be made to the evidence of Maulvi Abdul Haq, (D. W. 10) printed at p. 209 et seq., Vol. 2. On p. 210 this witness gives a list of the Sajjada Nashins of the shrine since the time of Baba Farid. The instance of Shah Ala-ud-Din Mauj Darya is not clear as it appears from the books of reference, that he was about 16 years of age at the time of appointment an age which is not of minority as understood by

Mahomedans. The instances of Diwan Sheikh Mohammad, the second, and Diwan Munawar Shah depend on the validity of a book known as "Israr Itrat Faridi," the authority of which is open to question. It seems doubtful, therefore, whether any reliance can be placed on these two instances so far as the present shrine is concerned. What is established beyond doubt is that amongst the previous Sajjada Nashins of this shrine, Shah Ala-ud-Din Mauj Darya, the third Sajjada Nashin succeeded by nomination at the age of 16 while the nomination of Diwan Said Mohammad as a minor was held good by their Lordships of the Privy Council in the previous case.

There is no doubt some rebuttal evidence produced on behalf of the plaintiff. It does not seem to me that any useful purpose will be served in examining this evidence at length. Indeed all this evidence is subject, in my opinion, to the same criticism as that passed by their Lordships of the Privy Council in the previous case, 22 Cal. 324,² to be found on page 332 of the judgment:

"The evidence which was produced on the other side does not appear to their Lordships to be either as valuable, or indeed as consistent with itself, as either the documentary evidence in favour of the right to appoint, or as the evidence in fact. In truth the witnesses for the defendant seem to alternate between a strict application of the Mahomedan law of succession to realty, and a sort of popular choice which must be ascertained by the wishes of the worshippers. In that state of things it is impossible to give the same effect to the latter evidence as to the coherent and perfectly reasonable evidence given for the plaintiff."

Exactly the same criticism applies mutatis mutandis in this case. I am satisfied in this case that there is no bar to the nomination of a minor and that the nomination of Diwan Qutab-ud-Din in this case was just as valid as the nomination of his father Diwan Said Mohammad who himself was a minor at the time of his succession. On the other hand, no reliability can be placed on the evidence adduced by the plaintiff to the effect that the descendants of Shah Ala-ud-Din Mauj Darya have the right to question the nomination made by the last holder or to select a successor themselves. The evidence to this effect is oral and is not based on any instances, proved either by personal knowledge or by reference to works of authority. In the previous case, both the trial Court and their Lordships of the Privy Council accepted as authoritative the Persian edition of the Jowahar Faridi a copy of which has been filed in this case as Ex. D.78. It has been contended that the copy Ex. D.78 is not the copy produced before the Privy Council in the last case. This may be so as the copy now produced does not bear any exhibit number; but nevertheless it seems clearly to be an issue of the same edition. The work was originally compiled in Hijri 1033 in manuscript and a printed edition was issued in Hijri 1301 corresponding to June 1884. Exhibit D.78 appears to be a copy of the printed edition of that year which was accepted by their Lordships of the Privy Council as authoritative and should, in my view, be similarly accepted in this case. There is nothing in this volume to support the contention of the plaintiff that the descendants of Shah Ala-ud-Din Mauj Darya have the right to reject the nomination made by the last holder or to select a successor themselves. On the other hand, the instances given in this volume would support the validity of the nomination of the defendant.

I would therefore reject the custom propounded

on behalf of the plaintiff that the descendants of Shah Ala-ud-Din Mauj Darya have the right to reject a nomination or to select a candidate themselves. As regards the question of revelation the evidence on both sides is confused. Some say a revelation is necessary, others say it is not. The case of the defendant as stated in the pleadings was that no revelation is necessary but that if revelation is deemed necessary it was in fact communicated by Diwan Said Mohammad at the time of the appointment of Diwan Qutab-ud-Din as a Murid in 1931. I see no reason to doubt the fact that Diwan Said Mohammad did at the time say that he had received a revelation authorising him to nominate Diwan Qutab-ud-Din as his successor. It is true that no such revelation is mentioned in the will of March 1933 but the real fact that emerges from the evidence appears to be that the factum of nomination is considered to imply the grant of a revelation as alleged by the evidence of some of the Sajjada Nashins of other shrines: vide D. W. Cs. 189, 173 and of other witnesses. It is natural that a devout worshipper would accept the nomination of a successor by a Sajjada Nashin as inspired by a revelation from the founder.

It is apparent from the document Ex. P.3 dated 27th January 1935 which purports to be a selection by the "Baradari" (consisting of some of the descendants of Shah Ala-ud-Din Mauj Darya) of the plaintiff as successor of Diwan Said Mohammad, that the lower Court is right in holding that the plaintiff was not elected on the Kul day, that is, the third day after Diwan Said Mohammad's death as he now alleges in evidence, but that his selection if any dates from 27th January 1935 when a *dastar bandi* ceremony was performed. The *dastar bandi* ceremony itself is not a root of title: see 1938 O.W.N. 1157⁴ at p. 1208. Thomas J. observed: "The *Dastar Bandi* ceremony is not a ceremony of selection but it is a ceremony of installation. A person has succeeded by an independent title and not as a result of the *dastar bandi*." In this case, the plaintiff had no independent title and the mere fact that a *Dastar Bandi* was performed in favour of the plaintiff by certain dissidents does not confer upon him any title. On the other hand, the *Dastar Bandi* ceremony performed in favour of the defendant on 1st February 1935 was the formal installation of the defendant in pursuance of a title which he had secured by his nomination as Sajjada Nashin first in 1933 and later confirmed on the death-bed of the last holder on 24th December 1934. In these circumstances I am of opinion that the plaintiff's suit was rightly dismissed by the trial Court. The appeal fails and is dismissed with costs. The defendant is entitled to his full costs throughout.

DALIP SINGH J. — I agree.

R.K.

Appeal dismissed.

4. ('38) 1938 O. W. N. 1157, Ali Raza Khan v. Nawazish Ali Khan.

* * A. I. R. (29) 1942 Lahore 147 FULL BENCH

DALIP SINGH, BHIDE AND
DIN MOHAMMAD JJ.

Diwan Ghulam Rasul — Petitioner

v.

Diwan Ghulam Qutab-ud-Din —

Respondent.

Civil Misc. No. 74/C of 1941, Decided on 10th March 1942; case referred to by Dalip Singh and Sale JJ., D/- 17th February 1942.

* Civil P. C. (1908), O. 45, R. 7 — Privy Council Rules, R. 9 — Time to deposit security can be extended : ('35) 22 A.I.R. 1935 Lah. 733 = 159 I. C. 232 and 40 P.L. R. 658 = ('38) 25 A. I. R. 1938 Lah. 207 = 179 I. C. 53, *OVERRULED*.

Under O. 45, R. 7, Civil P. C., read with R. 9, Privy Council Rules, the High Court has power to extend the time for deposit of security beyond the period fixed in O. 45, R. 7 ; ('35) 22 A. I. R. 1935 Lah. 733 = 159 I. C. 232 and 40 P. L. R. 658 = ('38) 25 A. I. R. 1938 Lah. 207 = 179 I. C. 53, *OVERRULED*; *Case law discussed*. [P 149 C 1 ; P 150 C 2]

Mahmud Ali — for Petitioner.

Barkat Ali — for Respondent.

ORDER OF REFERENCE

DALIP SINGH J.—The appeal in this case was dismissed by this Court on 6th May 1941.* Leave for appeal to the Privy Council was prayed for, and a certificate was granted on 10th November 1941. The time necessary under O. 45, R. 7, Civil P. C., has obviously expired. The last date from the grant of the certificate would have been 22nd December 1941. On 17th December 1941, an application was made for extension of time and this was granted on 18th December 1941, the order reading as follows : "Mr. Mahmud Ali cites A. I. R. 1938 Lah. 725.¹ Notice to respondent. Time extended ex parte, for the present without prejudice to right of respondent to challenge this order. Time for the present extended to 31st January 1942." The rest of the order is immaterial. It appears that on 31st January 1942, certain certificates were tendered to the Court for deposit as security. For various reasons which do not concern us in this matter, the Registrar has not yet accepted those certificates. An application has been put in by the respondent that this Court had no power to extend the time under the provisions of O. 45, R. 7, Civil P. C., and secondly, that even if this Court had such power, time could only be extended for cogent reasons and no such cogent reasons are present in this case. There have been on the first point, various conflicts of opinion in the various High Courts. It is sufficient merely to state here that the latest view of the following High Courts is in favour of the extension of time being within the power of the High Court. These rulings are, A.I.R. 1939 All. 299,² A.I.R. 1938 Mad. 796,³ 51 Bom. 430,⁴ A.I.R. 1940 Rang. 12⁵ and A. I. R. 1939 Pat. 667.⁶ Previous to these Full Benches, however, there was a conflict of opinion. 55 Mad.

* Reported in ('42) 29 A. I. R. 1942 Lah. 142.

1. ('38) 25 A.I.R. 1938 Lah. 725 : 180 I.C. 393 : 40 P. L. R. 712, Peoples Bank of Northern India v. Sm. Primla Devi.
2. ('39) 26 A. I. R. 1939 All. 299 : 181 I. C. 378 : I. L. R. (1939) All. 549 : 1939 A. L. J. 278 (F.B.), Bishnath Singh v. Collector, Benares.
3. ('38) 25 A. I. R. 1938 Mad. 796 : 177 I. C. 188 : I. L. R. (1938) Mad. 1007 : (1938) 2 M. L. J. 128 (F. B.), Ramayya v. Lakshmayya.
4. ('27) 14 A.I.R. 1927 Bom. 217 : 101 I. C. 555 : 51 Bom. 430 : 29 Bom. L.R. 352 (F.B.), Nilkanth Balwant v. Satehdanand Vidya Narasimha Bharathi.
5. ('40) 27 A. I. R. 1940 Rang. 12 : 185 I. C. 819 : 1939 R. L. R. 668 (F. B.), Ismail Ahmad Piperdi v. Momin Bi Bi.
6. ('39) 26 A.I.R. 1939 Pat. 667 : 185 I.C. 353 : 19 Pat. 128 : 20 P. L. T. 905 (F. B.), Lachmeshwar Prasad v. Giridhari Lal.

8357 held that there was no power in the High Court to extend time after the amendment of the Code in 1920. So also hold 55 All. 432⁸ and 44 All. 216.⁹ In the Lucknow Chief Court, 7 Luck. 528,¹⁰ held that there was no power. Another Division Bench of the Lucknow Chief Court in 14 Luck. 385,¹¹ without reference to the previous Division Bench has held that the Court has power to extend the time.

In Calcutta the commentary of Mulla seems wrongly to consider that the Calcutta High Court has held that there is power to extend the time. The Calcutta rulings we have been referred to are : 39 C. W. N. 651,¹² which holds that there is no power to extend the time, and 44 C. W. N. 920 = ILR (1941) 1 Cal. 299¹³ where two other judgments were cited and 39 C. W. N. 651¹² was approved. In our own Court in A. I. R. 1935 Lah. 733¹⁴—a judgment by Addison and Abdul Rashid JJ. — it was held that there was no power to extend time either under O. 45, R. 7, or by virtue of R. 9 of the Rules and Orders of the Privy Council printed in Vol. 5, Chap. 8-B of the High Court Rules and Orders. This ruling was followed by another Division Bench, Coldstream and Bhide JJ., in A. I. R. 1938 Lah. 207.¹⁵ In A. I. R. 1938 Lah. 725¹ though these rulings were referred to a Division Bench, Addison and Din Mohammad JJ., held that there was a power to extend the time. This case as well as 51 Bom. 430⁴ and A. I. R. 1940 Rang. 12⁵ went to the Privy Council on appeal and the point that the High Court had no power to extend the time does not appear to have been raised before the Privy Council.

A.I.R. 1938 Lah. 725¹ : The Privy Council decision in this case is reported in A. I. R. 1938 P. C. 284.¹⁶

51 Bom. 430⁴ : The Privy Council decision is reported in A. I. R. 1938 P. C. 188;¹⁷ and

7. ('32) 19 A. I. R. 1932 Mad. 484 : 133 I. C. 663 : 55 Mad. 835 : 62 M. L. J. 665, Poornananthachi v. Gopalaswami Odayar.
8. ('33) 20 A. I. R. 1933 All. 241 : 143 I. C. 559 : 55 All. 432 : 1933 A.L.J. 207 (F.B.), Bahadur Lal v. Judges of High Court, Allahabad.
9. ('22) 9 A.I.R. 1922 All. 43 : 65 I. C. 249 : 44 All. 216 : 20 A. L. J. 13, Ram Dhan v. Prag Narain.
10. ('32) 19 A.I.R. 1932 Oudh 249 : 136 I. C. 336 : 7 Luck. 528 : 9 O. W. N. 1, Hukum Chand v. Radha Kishen.
11. ('39) 26 A.I.R. 1939 Oudh 42 : 178 I. C. 389 : 14 Luck. 335 : 1938 O. W. N. 1121, Raja Mohan Manucha v. Manzur Ahmad.
12. ('35) 39 C. W. N. 651, Govind Narain Singh v. Shamlal Singh.
13. ('41) I. L. R. (1941) 1 Cal. 299 : 44 C. W. N. 920, Akimuddin Chowdhury v. Fateh Chand.
14. ('85) 22 A. I. R. 1935 Lah. 733 : 159 I. C. 232, Munna Lal v. Gajraj Singh.
15. ('38) 25 A. I. R. 1938 Lah. 207 : 179 I. C. 53 : 40 P. L. R. 658, Chandar Bhan v. Fateh Sher.
16. ('38) 25 A.I.R. 1938 P. C. 284 : 178 I. C. 659 : I.L.R. (1939) Lah. 1 : I.L.R. (1939) Kar. P. C. 16 (P. C.), Premila Devi v. Peoples Bank of Northern India, Ltd.
17. ('30) 17 A. I. R. 1930 P.C. 188 : 126 I.C. 417 : 54 Bom. 495 : 57 I. A. 194 (P. C.), Nilkanth Balwant v. Vidya Narain Bharathi.

A.I.R. 1940 Rang. 125 : The Privy Council decision is reported in A.I.R. 1941 P. C. 11.¹⁸

On the other hand, in 7 Luck. 528¹⁰ a reference is given to a case which went up to the Privy Council and in which the Lucknow Chief Court had held that they had no power to extend time and the order of the Chief Court was quoted in the order of the Privy Council without any adverse comment. In that case, however, special leave to appeal had been granted by the Privy Council and it may be urged that the point therefore could not arise. Be that as it may, I consider that in view of the conflict of Division Benches in our own Court this matter should be settled, as it is likely to arise very often, once and for all by a Full Bench. I may say that as at present advised my view would be that under O. 45, R. 7 especially as regards the second period of six weeks there is a discretion in the Court to extend time. The matter is more doubtful as regards the first period where there is a limiting provision of sixty days to the ninety days originally granted. At the same time, I am quite clear that R. 9 of the Privy Council Rules and Orders does confer a power on the High Court to extend time, for, as rightly pointed out in the Allahabad ruling, A.I.R. 1939 All. 299,² the opposition is between cancellation and extension and not between cancellation and some incidental orders to be passed thereafter. Had that been so, the rule, in my opinion, would have been differently worded. But, I must not be taken as expressing any final opinion on the point. As regards the merits of the case, I am of opinion that the petitioner has shown sufficient reason for allowing him extension of the time prayed for. As for some reasons the time for deposit of security has not yet been extended, I would further extend the time for the present without prejudice to the right of the respondent to contest the matter in the Full Bench up to 28th February 1942. As regards the second prayer for extension of the time for depositing printing fees I would allow up to the date of the furnishing of the estimate by the High Court and twenty days thereafter for the present. The point that I would refer to the Full Bench is whether under O. 45, R. 7 read with R. 9 of the Privy Council Rules and Orders the High Court has power to extend the time for deposit of security beyond the period fixed in O. 45, R. 7.

SALE J. — I agree that the petitioner has on the merits made out a case for extension of time. I agree with the order proposed by my learned brother and with the order of reference to a Full Bench.

OPINION

DALIP SINGH J. — The point referred to the Full Bench is whether under O. 45, R. 7, Civil P. C., read with R. 9 of the Privy Council Rules the High Court has power to extend the time for deposit of security beyond the period fixed in O. 45, R. 7. The facts of this case are given in the referring order where myself sitting with *Sale J.* agreed that this point should be referred to the Full Bench and at the same time agreed that on the merits the petitioner had a case for extension of time. The point was referred to the Full Bench by reason of the conflict of Division Benches in this Court and the difference of views that once prevailed in the various High Courts in India as well as the dissenting view of the Calcutta High Court. In this 18. (41) 28 A. I. B. 1941 P. C. 11 : 193 I. C. 209 (P. C.), *Ismail Ahmad v. Momin Bi Bi.*

Court in A.I.R. 1935 Lab. 733¹¹ a Division Bench, *Addison and Abdul Rashid JJ.*, held that under O. 45, R. 7 there is no possibility of extension beyond the period fixed and that under R. 9 of the Privy Council Rules the words "or make such further or other order as the justice of the case requires" are only ancillary to the power conferred in the rule to "give such directions as to the costs of the appeal and the security entered into by the appellant", and this ruling was followed in A.I.R. 1938 Lab. 207¹⁵ by a Division Bench of *Coldstream and Bhide JJ.* No particular reasons were given in this decision which merely followed the first Division Bench. In A.I.R. 1938 Lah. 725¹ *Addison and Din Mohammad JJ.* held on a consideration of all the rulings that time could be extended both under the Code and under R. 9 of the Privy Council Rules.

The matter has been a question of dispute in the various High Courts but now the prevailing view of all the High Courts other than the Calcutta High Court is that time can be extended under R. 9 of the Privy Council Rules. There is some doubt on the question whether time can also be extended under O. 45, R. 7, Civil P. C. I merely briefly mention the Full Bench decisions of the various High Courts. In 51 Bom. 430¹ on a difference of opinion between *Shah J.* and *Fawcett J.* the Full Bench held that whatever might be the effect of the words in O. 45, R. 7 as amended by Act 26 of 1920, under R. 9 of the Privy Council Rules power was clearly given to the High Court to extend time by virtue of the words "or make such further or other order as the justice of the case requires". In A.I.R. 1938 Mad. 796³ the opinion was expressed that the first period given in O. 45, R. 7 could not be extended beyond the period of sixty days which is provided in the rule. No opinion was expressed as to whether there was any difference about the six weeks' period mentioned in the second part of the rule. However, it was held that under R. 9, Privy Council Rules, it was clear that the Court had power to extend the time and that S. 112, Civil Procedure Code, made it clear that the Rules framed by the Privy Council would prevail over the Civil Procedure Code. Similarly, in A.I.R. 1939 All. 299² it was held that time could be extended under R. 9, Privy Council Rules, but that under O. 45, R. 7 of the Code the time prescribed could not be extended either beyond the first period of time or the second period of time. No reason was given for including the second portion except that it would manifestly contravene the intention of the Legislature. This point I shall deal with later. Similarly, in A.I.R. 1940 Rang. 12,⁵ another Full Bench, it was held that no extension could be given under the Code but extension could be given under R. 9, Privy Council Rules. In A.I.R. 1939 Pat. 667⁶ it was similarly held that extension could be given under R. 9, Privy Council Rules, though it could not be given beyond the first period mentioned in O. 45, R. 7.

As regards the Calcutta High Court, in 39 Cal. W. N. 651¹² a Division Bench of that Court held that R. 9, Privy Council Rules, did not override the Code nor was intended to do so. No reasons were given for this decision. It was held therefore that time could not be extended by the High Court. This ruling was followed in I.L.R. (1941) 1st Cal. 299,¹³ where the learned Judges also referred to some other rulings in which 39 Cal. W.N. 651¹² had been followed. No reasoning was given in this ruling. In 7 Luck. 528¹⁰ it was held that time could not be extended. The reasoning given was that this was the practice of the Court and was the intention

under O. 45 R. 7 and that the Privy Council had quoted without disapproval an order of the Oudh Chief Court refusing to extend time on the ground that they had no power to extend the time. It should be pointed out, however, that in this case special leave to appeal had been obtained and therefore the point would not have arisen. In 14 Luck. 335¹¹ a Division Bench of the same Court without reference to the previous Division Bench but following the Bombay Full Bench came to the conclusion that time could be extended. I will now proceed to consider the arguments on both sides. It has been urged before us that R. 9, Privy Council Rules, should be read as suggested in A. I. R. 1935 Lah. 733.¹⁴ This construction has been adopted by some other Judges in the various Courts. I do not think the construction is really justified. In the first place, the rule does not say that the Court shall cancel the certificate. Further, if the words "or make such further or other order etc.", were not in opposition to the words "may cancel the certificate", there is no reason for using the word "or" at all. The word should then be "and" because this "further order" would be ancillary to the clause giving power to "give directions as to the costs of the appeal and the security entered into by the appellant". I therefore consider that it is quite clear that the words "or make such further or other order" are in opposition to the words "may cancel" and therefore the opposition is between cancellation and extension, from which it would follow that under the Privy Council Rules the Court has power to extend time.

I now turn to consider the words used in O. 45, R. 7, Civil P. C. Originally this rule allowed the appellant six months from the date of the decree complained of or six weeks from the date of the grant of the certificate. The rule as it then stood was interpreted by the Calcutta High Court to give power to the Court to extend time. The reasoning given by the Calcutta High Court was that the rule provided no penalty for failure on the part of the applicant to furnish security. Applying the known principles of the law they therefore held that this absence of penalty meant that the words were directory and not mandatory and therefore the Court had power to extend the time fixed. Their Lordships of the Privy Council approved of this decision for the reasons given in 10 Cal. 557.¹⁹ Subsequently, by Act 26 of 1920 the rule was amended and the period of six months was cut down to ninety days or such further period not exceeding sixty days as the Court may allow. The period of six weeks remained as before. No penalty was provided for failure. The Privy Council Rules were framed in February and it is clear that the draftsman of the amendment to the Code had the rules of their Lordships of the Privy Council before him. If then the Rules of the Privy Council mean that the High Court has power to extend time, it would follow that the draftsman of the amendment to the Code who knew that S. 112, Civil P. C., made the Rules of Privy Council prevail over the Civil Procedure Code must have seen that there was no point in framing a rule in conflict with the rules of their Lordships of the Privy Council. The question is whether inadvertently somehow a conflict was created. I do not see that it is at all necessary to consider that any such conflict was either advertently or inadvertently created. The draftsman presumably was aware that the reason for the Privy Council holding that time

could be extended was the absence of a penalty whereby the rule must be read as directory and not mandatory. It is curious then that in spite of that only one period was altered and the second period was left untouched and no penalty was provided. Presumably, therefore, the second period at any rate, remained directory as before. It was sought to be argued that by reason of the principle *expressio unius exclusio alterius* the limitation put upon the first part must be read into the second part of the rule. This argument might have been of greater force if the history of the rule did not disprove the force of the argument. But quite apart from this question a further question remains as to what was the intention of the Legislature in cutting down the first period.

It has been assumed—and indeed correctly—that the object was to save the delays in the Privy Council appeals. But delays in the Privy Council appeals would be saved by cutting down the period of six months to ninety days and sixty days without in any way disturbing the power of the High Court for cogent reasons to extend the time. By cutting short the period of six months the Code made it imperative on the person appealing to deposit his security within three months instead of six months on pain of having to apply to the Court to extend the time by sixty days which the Court might or might not be prepared to do. This certainly saved delay and if further the Legislature had intended to take away the power of the Court to extend time, then in view of the previous interpretation of the section it would have made it clear that the Courts had no more power to extend the time. But no such thing has been done. There is nothing to show the Legislature thought the delays were due to the Courts extending time without adequate reasons. I would therefore consider that even under the Code the periods prescribed remain directory and not mandatory and the power of the Court to extend the periods for cogent reasons has not been taken away. But even if this view is wrong, I am quite clear that under R. 9 of the Privy Council Rules the Court has power to extend the time and therefore as under S. 112, Civil P. C., the Privy Council Rules must prevail over O. 45, R. 7, the matter is one of only academic importance. I would therefore answer the question referred to the Full Bench in the affirmative.

BHIDE J.—I agree.

DIN MOHAMMAD J.—I agree and would like to add that although the case in which extension of time was granted by the Division Bench of which I was a member, went to the Privy Council, the question raised before us that this Court was not empowered to grant extension was not raised there, nor did their Lordships suo motu take up that question. Similarly, some of the other cases in which time had been extended went to the Privy Council but the respondents in those cases did not challenge the power of the High Courts concerned to extend the time. This evidently supports the construction put by my learned brother Dalip Singh J. on R. 9 of the Privy Council Rules as well as R. 7 of O. 45, Civil P. C.

R.K.

Reference answered.

C. P. C.—

(40) Chittaley, O. 45 R. 7, N. 7 Pt. 13.

(41) Mulla, Page 1215 Pt. (m).

A. I. R. (29) 1942 Lahore 151

SALE J.

Prem Singh — Defendant — Petitioner

v.

Tulsi Ram and others — Respondents.

Civil Revn. Petn. No. 425 of 1941, Decided on 12th November 1941, for revision of order of Dist. Judge, Ludhiana, D/- 5th July 1941.

Succession Act (1925), Ss. 193, 194—District Judge holding complete enquiry but not expressly stating in his order that he was satisfied that applicants were prima facie entitled to property —Petitioner taking advantage of remedy by suit —No interference in revision.

The technical irregularity committed by the District Judge in not expressly recording before issuing notice that he has satisfied himself that the applicants were prima facie entitled to the property and would suffer material prejudice if left to their ordinary remedy is not a ground for interference in revision where the District Judge had held a complete inquiry and the applicant has also taken advantage of the remedy by suit : ('18) 5 A. I. R. 1918 Lah. 380 and 15 P. R. 1901, *Rel. on* ; ('38) 25 A. I. R. 1938 Lah. 753, *Disting.*
[P 151 C 2 ;
P 152 C 1]

Mela Ram — for Petitioner.

Yashpal Gandhi — for Respondents.

ORDER.—This is a petition for revision of the order of the learned District Judge of Ludhiana holding in a summary inquiry under S. 194, Succession Act, that the respondents are entitled to the possession of certain property left by a widow Mt. Mathra Devi. The material facts are that one Radha Kishen who died in about 1920 left a widow Mathra Devi and a daughter Achra Devi. The daughter Achra Devi died in 1938-34. After her death the property appears to have continued in the occupation of Radha Kishen's widow Mathra Devi; and according to the allegations made by the applicants, Prem Singh petitioner defendant, who is the brother's grandson of Mathra Devi, was also in occupation, with Mt. Mathra Devi. He claims, it appears, to be her adopted son. On the death of Mathra Devi, this petition was filed by the three surviving brothers of Radha Kishen viz., Tulsi Ram, Munshi Ram and Shadi Ram and the nephew Hukam Chand under S. 192, Succession Act, alleging that Prem Singh was in unlawful possession of the property and asking for an order for possession under S. 194. The learned District Judge after examining Tulsi Ram, recorded an order that he was satisfied by the statement of Tulsi Ram that there was a prima facie ground for issuing notice and that the application was bona fide. He then proceeded to frame an issue and after hearing the evidence of both sides he came to the conclusion for the purposes of this summary inquiry that the applicants are entitled to possession of this property and directed that possession be delivered accordingly. From this order this petition for revision has been preferred on the ground that the learned District Judge has acted illegally and with material irregularity in the exercise of his jurisdiction by not following strictly the procedure laid down in S. 193 of the Act. In the grounds for revision it was alleged inter alia that the learned District Judge had not examined the applicants on oath before issuing notice. This ground is clearly wrong and was in fact abandoned by counsel in arguments. The learned District Judge did ex-

amine one of the applicants on oath viz., Tulsi Ram, before issuing notice.

For the rest, the main point urged by counsel is that the learned District Judge before issuing notice omitted to say that he had satisfied himself that the applicants were prima facie entitled to the property and would be materially prejudiced if left to the ordinary remedy of a regular suit. Under S. 193, Succession Act, before issuing process, the Court must (1) examine the applicant on oath, and (2) satisfy itself (a) that the party in possession is no longer entitled (b) that the applicant is prima facie entitled, (c) that he is likely to be materially prejudiced if left to the ordinary remedy of a suit, and (d) that the application is bona fide. The learned District Judge observed some of these requirements but did not in his order before issuing notice expressly state that he was satisfied that the applicants were prima facie entitled to the property and would be materially prejudiced if left to the ordinary remedy of a suit. Now, there are no doubt numerous authorities which have held that the omission to observe strictly all the requirements of S. 193 may constitute a material irregularity in the exercise of jurisdiction, and that the High Court can interfere in revision where a good case for interference is made out. So far as this Court is concerned, the latest authority to which my attention has been directed is a judgment by Broadway J. sitting in Single Bench, cited in 72 P. R. 1918.¹ In that case the learned Judge was satisfied that the District Judge had acted without jurisdiction and had not observed the requirements of Ss. 3 and 4 of Act 19 of 1841, which in terms correspond to Ss. 193 and 194 of the present Succession Act. Nevertheless the learned Judge in considering whether the Court should interfere took notice of the fact that a regular suit had been filed by the applicant, in other words, that the petitioner had another remedy of which he had already availed himself; and following what the learned Judge described as the general practice of the Court as laid down in 15 P. R. 1901,² he declined to interfere and dismissed the petition.

In the present case also the petitioner has admittedly taken advantage of the other remedy open to him by instituting a suit for the property in question. Mr. Mela Ram has not cited before me any later authority of this Court to show that the practice of the Court referred to by Broadway J. in 72 P. R. 1918³ has since been altered. It is true that in A. I. R. 1938 Lah. 753³ Bhide J. interfered in revision in a case under S. 194, Succession Act, but in very different circumstances. He held that on the allegations of the parties the Succession Act had no application at all because the dispute related not to a case of succession but to a case of survivorship. In the present case it cannot be said that the Succession Act has no application since it is a case of succession and not of survivorship. According to Mr. Mela Ram's arguments the petitioner's reliance is mainly on a will alleged to have been executed by Radha Kishen in favour of his daughter Mt. Achra Devi, dated 2nd January 1921. He contends that this will made Mt. Achra Devi Radha Kishen's heir, that the property in suit was therefore the stridhan

1. ('18) 5 A. I. R. 1918 Lah. 380 : 46 I. C. 589 : 31 P. L. R. 1918 : 72 P. R. 1918, *Ganga Sahai v. Babu Lal*.

2. ('01) 15 P. R. 1901 : 60 P. L. R. 1901, *Joti Mal v. Coates*.

3. ('38) 25 A. I. R. 1938 Lah. 753 : 179 I. C. 103 : I. L. R. 1939 Lah. 196 : 41 P. L. R. 766, *Bua Ditta v. Sahib Diyal*.

property of Achra Devi and that therefore it is Achra Devi's heirs who should succeed and not the applicants who are the brothers of Radha Kishen. The learned District Judge has not mentioned this will in his judgment. It is no doubt on the record but it is doubtful whether it has been proved. It was produced by Prem Singh but curiously enough Prem Singh in his statement on oath before the District Judge makes no mention of it whatsoever. It is apparent that before Prem Singh could succeed, he would have to satisfy the Court as to the execution and validity of this will. This he has not yet done even for the purposes of the present summary proceedings.

I doubt whether the technical irregularity committed by the District Judge in not expressly recording before issuing notice that he has satisfied himself that the applicants were prima facie entitled to the property and would suffer material prejudice if left to their ordinary remedy, is of any substance in the present case. After the issue of notice the learned District Judge heard all the evidence on both sides and came to a finding, of which the only possible criticism is that he has not mentioned the will produced by Prem Singh. As I have already remarked, it is extremely doubtful whether this will can at this stage be said to be proved. I am not therefore prepared to hold that the District Judge was wrong in not referring to this will or that the omission constitutes a ground for interference.

In 72 P. R. 1918¹ Broadway J. although holding that the District Judge had acted without jurisdiction declined to interfere in spite of the complaint that a complete inquiry had not been held. Here a complete inquiry for the purposes of S. 194 has been held. The ground for non-interference is therefore much stronger than in 72 P. R. 1918.¹ I therefore decline to interfere and dismiss the petition but in the circumstances leave the parties to bear their own costs in this Court. I refrain from expressing any opinion on the petitioner's title on the basis of the will, which is left open for decision in the regular suit which I understand from Mr. Mela Ram is pending in the civil Court.

K.S./R.K.

*Petition dismissed.***A. I. R. (29) 1942 Lahore 152****DIN MOHAMMAD J.**

Nasib Singh represented by Ram Chandar and others — Defendants — Appellants

v.

Amin Chand and another, Plaintiffs and another, Defendant —

Respondents.

Civil Reference No. 27 of 1940, Decided on 30th January 1942, referred by District and Sessions Judge, Ambala, D/- 31st August 1940.

Punjab Tenancy Act (16 of 1887), Ss. 77, 4 (1) — Trees on agricultural land are not "land" within S. 4 (1) — Suit between owner of trees and person who has planted them is not suit between landlord and tenant — It is cognizable by civil Court.

Trees standing on agricultural land are not land within the meaning of S. 4 (1) and consequently, a suit between the owner of the trees and the person who has planted them is not a suit between a landlord and his tenant. The civil Court, therefore, is

competent to try such suit: ('25) 12 A. I. R. 1925 Lah. 29, *Rel. on*; ('20) 7 A. I. R. 1920 Lah. 351, *Dissent*. [P 152 C 2]

Shamair Chand — for Respondents.

ORDER.—This is a reference made by the District Judge, Ambala, under S. 100, Punjab Tenancy Act. After hearing Mr. Shamair Chand, I am satisfied that the recommendation made by the District Judge cannot be accepted. The suit, out of which this reference has arisen, was instituted by Amin Chand and Chuhar Ram against Nathu Kahar and Nasib Singh for possession of certain mango, shisham and jaman trees standing on 3 bighas and 9½ biswas of land, or in the alternative for recovery of Rs. 400. The defendants resisted the suit on various grounds. It was contended inter alia by defendant 2 that the civil Court had no jurisdiction to try the suit, inasmuch as the suit was against the landlord by a tenant who has been unlawfully dispossessed by the landlord and as such is triable by a revenue Court only. The trial Court repelled this contention and decreed the suit for possession of the trees in dispute. On appeal, the District Judge has come to a contrary conclusion. Hence this reference.

A tenant under the Tenancy Act means a person who holds 'land' under another person and 'land' as defined in that Act means land which is not occupied as the site of any building in a town or village and is occupied or has been let for agricultural purposes or for purposes subservient to agriculture or for pasture. It is obvious that this definition excludes trees standing on agricultural land. A much wider definition was enacted for the purposes of the Land Alienation Act, but even that definition was found not to include trees and it was on this ground that the law was amended in 1936 and a new sub-clause was added to the effect that all trees standing on agricultural land would also be land. No such amendment was however made in the Tenancy Act. It evidently follows that trees standing on agricultural land are not land for the purposes of that Act and consequently a suit between the owner of the trees and the person who has planted them is not a suit between a landlord and his tenant. If any authority is needed for this proposition, reference may with advantage be made to 5 Lah. 385.¹ In that judgment, 15 P. R. 1892² and 46 P. R. 1893³ were referred to with approval. It is further significant that that judgment definitely overruled 108 P. R. 1919,⁴ where Wilberforce J. had held that trees were land. I accordingly hold that the civil Court was competent to try this suit and direct the District Judge to dispose of the appeal in accordance with law.

G.N./R.K.

Order accordingly.

1. ('25) 12 A. I. R. 1925 Lah. 29 : 84 I. C. 89 : 5 Lah 385, Achhru Mal v. Maula Bakhsh.

2. ('92) 15 P. R. 1892 (F. B.), Dhani Das v. Aya Ram.

3. ('98) 46 P. R. 1893, Yarn v. Adil.

4. ('20) 7 A. I. R. 1920 Lah 351 : 58 I. C. 638 : 108 P. R. 1919, Amir Khan v. Lahori Mal.

*** * A. I. R. (29) 1942 Lahore 153**

FULL BENCH

TEK CHAND, BHIDE AND BECKETT JJ.

Gauri—Decree-holder—Appellant

v.

Ude and others — Judgment-debtors — Respondents.

Letters Patent Appeal No. 117 of 1940, Decided on 15th April 1942, referred to by Tekchand and Beckett JJ., D/- 20th January 1942, from order of Sale J., D/- 12th March 1940.

(a) Civil P. C. (1908), Ss. 47 and 60 (1) (c) — Objection under S. 60 (1) (c) falls under S. 47 and must be decided by executing Court.

3 An objection under S. 60 (1) (c) to the sale of the property falls within the purview of S. 47 and will therefore have to be decided by the executing Court. [P 155 C 2]

(b) Civil P. C. (1908), O. 21, R. 54 — Attachment is necessary preliminary to sale — Object of attachment stated.

Attachment is a necessary preliminary to sale and the object of the attachment is to give notice to the judgment-debtor not to alienate his property and to the public not to accept any alienation from him : 7 All. 702, *Rel. on.* [P 155 C 2]

(c) Civil P. C. (1908), O. 21, R. 90 and S. 60 — Scope — Objections to saleability of property do not fall under O. 21, R. 90.

4 Under O. 21, R. 90 a sale can be set aside only on the ground of a material irregularity or fraud in publishing or conducting it. It does not cover any objections to the sale on the ground that the property in question was not liable to be sold under S. 60. The word "conducting" has been used with reference to the proceedings of the officer conducting the sale and cannot be construed so widely as to cover objections relating to saleability of property : 7 All. 641, *Rel. on.* [P 158 C 1]

* (d) Civil P. C. (1908), O. 21, Rr. 92, 89, 90, 91 and Ss. 60 and 65 — O. 21, R. 92 does not contemplate any objections to sale except those covered by O. 21, Rr. 89 to 91 — Objection under S. 60 (1) (c) is not permissible after sale.

Order 21, R. 92 makes it clear that after the sale is effected the Code does not contemplate any objections to the sale being raised except those covered by Rr. 89, 90 and 91. If any other objections such as those under S. 60 were permissible after sale, R. 92 would not have made it obligatory for the Court to confirm the sale in the absence, or in the event of dismissal, of applications made under Rr. 89, 90 and 91. This view is supported by S. 65 which also implies that the real sale takes place when the property is auctioned and it is liable to be set aside only if there are material irregularities or fraud in publishing and conducting the sale, but not otherwise. [P 156 C 1,2]

* * (e) Civil P. C. (1908), S. 47, O. 21, R. 92 and S. 60 — Application to set aside sale such as on ground of exemption provided in S. 60 falling under S. 47 — Limitation is governed by Art. 166, Limitation Act — Judgment-debtor cannot ignore sale on ground that Court had no jurisdiction to sell until he proves exemption — Word "sale" in Art. 166 refers to auction sale : I.L.R. (1939) Lah. 103 = ('39) 26 A. I. R. 1939 Lah. 113 = 184 I. C. 393, **OVERRULED.**

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No doubt, no limitation is specifically provided for applications falling under S. 47. But an application for setting aside a sale on the ground such as of exemption under S. 60, which falls within the scope of S. 47 is governed by Art. 166, Limitation Act. The judgment-debtor cannot ignore the auction sale on the ground that the Court had no jurisdiction to sell the property, because the Court would have jurisdiction to sell, unless and until the facts showing that the property is exempt from attachment or sale are alleged and proved by the judgment-debtor. If the judgment-debtor fails to allege before the sale facts entitling him to claim exemption under S. 60 which lie within his knowledge and the burden of proving which would naturally rest on him, it cannot be said that the Court had no jurisdiction to sell the property and hence the sale was a nullity. Therefore, if a judgment-debtor does not raise his objection to the sale before the property is sold, his objection to the saleability of the property taken after the sale, must be taken to be tantamount to an application to set aside a sale and as such governed by Art. 166, Limitation Act. The sale referred to in Art. 166 is clearly the auction-sale. There can obviously be no question of setting aside a sale, after it has been confirmed and becomes absolute under O. 21, R. 92 : I.L.R. (1939) Lah. 103 = ('39) 26 A. I. R. 1939 Lah. 113 = 184 I. C. 393, **OVERRULED.** [P 157 C 1, 2]

(f) Civil P. C. (1908), S. 47 and O. 21, Rr. 90 and 92 — S. 47 is not completely independent of O. 21, R. 90.

It is incorrect to say that S. 47 is completely independent of the provisions of O. 21, R. 90. That view is opposed to the plain wording of O. 21, R. 92. If the intention of the Legislature was that objections to sale falling under S. 47 should be independently considered even after the sale, the Legislature might have been expected to make a provision to that effect; but it is significant that no such provision has been made. [P 158 C 1]

* (g) Civil P. C. (1908), Ss. 11 and 47 — Execution proceedings — S. 11 does not apply — General principle of res judicata including principle of constructive res judicata applies — Principle applies to matters decided in same proceeding.

Although S. 11 does not apply to execution proceedings the general principle of res judicata applies to such proceedings including the principle of constructive res judicata embodied in Expl. 4 to S. 11 : 8 Cal. 51 (P.C.); ('35) 22 A. I. R. 1935 Lah. 200; ('33) 20 A.I.R. 1933 Lah. 697 and ('35) 22 A.I.R. 1935 Lah. 949, *Rel. on.* [P 158 C 1]

The principle of res judicata including the principle of constructive res judicata applies not only to matters decided in prior execution proceedings but also to matters decided in the same proceeding : 6 All. 269 (P.C.), *Rel. on.* [P 158 C 2]

* * (h) Civil P. C. (1908), Ss. 47, 11 and 60 and O. 21, Rr. 66, 90 and 92 — O. 21, Rr. 66, 90 and 92 indicate that objections to proposed sale must be raised by judgment-debtor before auction takes place — Notice under O. 21, R. 54 and R. 66 duly served on judgment-debtor — Objection to saleability of property under S. 60 not raised — Judgment-debtor is barred from raising it later by principle of constructive res judicata — Exceptions stated — No question of Court's jurisdiction to sell property arises until judgment-debtor alleges and proves ground of exemption under S. 60 — When no objection is

^a raised, sale must be held to be with jurisdiction — That third party's interests intervene after sale is additional ground for not allowing judgment-debtor to raise objection under S. 60 after auction sale : I.L.R. (1939) Lah. 103=(39) 26 A.I.R. 1939 Lah. 113=184 I. C. 393; (35) 22 A.I.R. 1935 Lah. 942=160 I. C. 749 and 38 P.L.R. 691=(36) 23 A.I.R. 1936 Lah. 930, *OVERRULLED*.

Order 21, R. 66, read with O. 21, Rr. 90 and 92 makes it clear that the Code does not contemplate any objections being raised after the auction, except such as fall within the scope of R. 90 i. e., objections relating to material irregularities and fraud in publishing and conducting the sale. This is presumably because objections such as those to the liability of the property to be sold are intended to be disposed of before the sale. An order under O. 21, R. 66 is not merely of an administrative character. ^b The provision for notice under O. 21, R. 66 has been made with the intention that all objections which the judgment-debtor may have to the proposed sale should be raised and disposed of before the auction takes place. [P 160 C 1]

Where the judgment-debtor is duly served with notice under O. 21, R. 54 and R. 66 but fails to raise any objection to the proposed sale such as on the ground of exemption of property from attachment and sale under S. 60 at the time when the issue as to the sale of the property is raised by the decree-holder and the Court then proceeds to order the sale of the property, the matter must be considered to be res judicata so as to debar the judgment-debtor from raising that objection later on the principle of constructive res judicata : I.L.R. (1939) Lah. 103=(39) 26 A.I.R. 1939 Lah. 113=184 I. C. 393, *OVERRULLED*; (30) 17 A.I.R. 1930 Lah. 106, *Approved*; 7 All. 641; 12 Mad. 19 (P.C.); 8 Cal. 51 (P. C.); 6 All. 269 (P. C.) and (31) 18 A. I. R. 1931 P.C. 33, *Rel. on*; *Case law discussed*. [P 158 C 1; P 160 C 2]

The question of the Court's jurisdiction to sell the property does not arise until and unless the judgment-debtor has alleged and proved the facts entitling him to claim exemption under S. 60. When no objection is raised by the judgment-debtor as to the saleability of the property under S. 60 when the issue was raised, the order for sale passed by the Court cannot be said to be without jurisdiction : (35) 22 A. I. R. 1935 Lah. 942 = 160 I. C. 749 and 38 P.L.R. 691=(36) 23 A.I.R. 1936 Lah. 930, *OVERRULLED*. [P 158 C 2]

^a The fact that a third party's interests intervene after the auction sale is an additional ground for not allowing a judgment-debtor to raise, after the auction sale an objection under S. 60 as to the saleability of the property, which he could and should have raised before that sale : (31) 18 A.I.R. 1931 P.C. 33, *Rel. on*. [P 159 C 1]

The position would be, of course, different if the judgment-debtor were not duly served with notice about the intended auction sale. In that case the judgment-debtor could not have taken the objection before the sale and consequently the principle of res judicata would not apply : (39) 26 A.I.R. 1939 Lah. 222, *Rel. on*. [P 159 C 1]

Similarly, the principle of res judicata will not apply if the objection in question such as one under S. 60 did not exist at the time of the sale but became available later : (38) 25 A. I. R. 1938 All. 35, *Rel. on*. [P 159 C 1]

(i) Civil P. C. (1908), O. 21, R. 92—Sale takes place on date of auction and not when it is confirmed (*Obiter*).

The sale in execution must be deemed to take place on the date on which the auction is held and not on the date on which it is confirmed : (42) 29 A.I.R. 1942 Lah. 102 (F.B.), *Rel. on*. [P 158 C 2]

* (j) Civil P. C. (1908), Ss. 47 and 60 and O. 21, Rr. 65 and 64 — Order under S. 284 of Code of 1882 was not appealable as an order — Question whether order under O. 21, R. 66 is appealable depends upon whether it determines any right or liability between decree-holder and judgment-debtor — If it does it is appealable — Order under O. 21, R. 66 determining question of saleability of property under S. 60—Order is appealable under S. 47.

It cannot be said that an order under S. 284 of the Code of 1882 was appealable as an order. The question whether an order for sale under O. 21, R. 66 (read with R. 64) is or is not appealable would depend upon whether it determines any rights or liabilities as between the decree-holder and the judgment-debtor and is not purely of interlocutory character deciding a mere matter of procedure. If it does determine any right or liability it would obviously fall under S. 47 and be appealable as a decree. If the order determines, e.g., a question as regards the saleability of certain property under S. 60 there is no reason why it should not be appealable under S. 47 merely because it is passed in the course of the proceedings under O. 21, R. 66 relating to the proclamation of the sale: 4 C.L.R. 27 and (24) 11 A.I.R. 1924 Mad. 365, *Rel. on*; (35) 22 A. I. R. 1935 All. 1016, *Dissent*. [P 160 C 1]

(k) Civil P. C. (1908), O. 21, R. 90 proviso 2 framed by Lahore High Court and R. 92—Scope —O. 21, R. 90 proviso 2 covers only such objections as but for the proviso would be covered by O. 21, R. 90 — O. 21, R. 90 proviso 2 is no bar to objections relating to saleability of property such as those under S. 60 after sale—Bar to such objections after sale is implied by O. 21, R. 92.

A proviso to an enactment creates an exception to the subject-matter of the main portion of the enactment and must be read along with it. Proviso 2 to O. 21, R. 90 can, therefore, cover only such objections which but for the proviso, would be covered by the rule. Since O. 21, R. 90 refers to objections relating to material irregularities or fraud in publishing or conducting a sale, proviso 2 thereto also must refer to objections falling under the same category. Therefore, proviso 2 to O. 21, R. 90 cannot be held to be a bar to objections such as those under S. 60 relating to the saleability of the property after sale. But the bar to such objections after the sale is implied by the provisions of O. 21, R. 92, which make it obligatory for the Court to confirm a sale when no objections are raised under Rr. 89, 90 and 91 or such objections are dismissed. [P 160 C 1, 2]

(l) Civil P. C. (1908), O. 21, R. 92, S. 151 and O. 47 — Hardship worked by strict application of O. 21, R. 92 may be remedied under S. 151 or by review (*Per Beckett J.*).

There may be cases in which a strict application of O. 21, R. 92 might work some hardship, but any rules of this kind are subject to the operation of S. 151. The Court can remedy injustice by review also. But a party must show good cause for standing by and allowing a sale to take place before he can be allowed to say that the sale should not have taken place at all. If he had ample opportunity for raising any such objection, and the grounds for

- a making such objection were within his own personal knowledge, there is no reason why the sale should be upset on such grounds either before or after confirmation. [P 160 C 2; P 161 C 1]

Qabul Chand—for Appellant.

Manohar Lal Mehra—for Respondents.

BHIDE J.—The question of law which has been referred to the Full Bench for decision in this case is this :

If property is attached in execution proceedings and if the judgment-debtor has objections to raise on the ground that the property is not liable to attachment or sale, is he entitled to wait until sale has taken place and then have the sale set aside on the ground that the Court has no jurisdiction to sell the property ?

- b The material facts of the case bearing on the decision of the above question are as follows : A decree was passed against one Mohan on 25th October 1935. Execution was taken out on 10th May 1937 and seven properties were attached including some residential houses. Notice was given to the judgment-debtor, but he raised no objections before the sale, which took place on 11th March 1938. On 24th March 1938, the judgment-debtor presented a petition raising various objections to the sale, some of which fell under O. 21, R. 90, Civil P. C., and one under S. 47 read with S. 60, Civil P. C. We are concerned here only with the latter objection, viz., that the judgment-debtor was an agriculturist and that his house property was not liable to be attached or sold under S. 60, Civil P. C. This petition was resisted inter alia on the ground that the judgment-debtor was not entitled to raise this objection after the sale. Reliance was placed in support of this contention on proviso 2 to O. 21, R. 90, Civil P. C., (as framed by this Court) and also on A. I. R. 1930 Lah. 106¹ and certain other rulings which were followed therein. The judgment-debtor on the other hand relied on a Division Bench ruling of this Court reported in I.L.R. (1939) Lah. 103,² in which after a review of the case law on the point, it was held that it is open to the judgment-debtor to raise an objection of this kind under S. 60, Civil P. C., even after the sale (i. e., the auction) but before the sale is confirmed under O. 21, R. 92, Civil P. C.

- The trial Court dismissed the objection under S. 60, Civil P. C., following A. I. R. 1930 Lah. 106¹ and A.I.R. 1937 Lah. 309³ but on appeal the learned District Judge upheld it in view of the Division Bench ruling referred to above, I.L.R. (1939) Lah. 103.² This decision was also upheld by a learned Judge of this Court on the basis of the same ruling, but he gave a certificate for appeal under Cl. 10 of the Letters Patent. The Bench before whom the Letters Patent appeal came up for decision, was of opinion that in view of the conflict of rulings, the question of law involved was fit for reference to a Full Bench and the question has accordingly been referred to this Bench. Before proceeding to discuss the point of law involved, it will be useful to refer briefly to the provisions of the Code bearing on the point. The relevant provisions are to be found in Ss. 47 and 60 and O. 21, Civil P. C. Section 47 confers on the

executing Court exclusive jurisdiction to decide all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree. Section 60 defines the properties which are liable to be attached and sold in execution of a decree and contains a proviso excluding various classes of properties from attachment or sale. Under cl. (c) of this proviso, houses and buildings belonging to an agriculturist and occupied by him are excluded from attachment or sale and it is this clause which was relied on by the judgment-debtor in this case. An objection of this kind to the sale of the property would obviously fall within the purview of S. 47 and will therefore have to be decided by the executing Court. It may be incidentally mentioned here that this clause has been amended by S. 34, Punjab Relief of Indebtedness Act, and also by Punjab Act 12 of 1940, but those amendments are not material for the purpose of this reference. The amendment made by S. 34, Punjab Relief of Indebtedness Act, is not material in view of the findings of fact arrived at by the Courts below, while Act, 12 of 1940 came into force after the execution sale in the present case and does not, therefore, govern this case. Coming now to the provisions of O. 21, we find that it lays down the general procedure for executing decrees and is divided into rules under different headings.

We are here concerned with the sale of immovable property in execution and the relevant provisions will be found under the headings dealing with the attachment and sale of such properties. Attachment is a necessary preliminary to sale and the object of the attachment is, as pointed out by Mahmood J. in 7 All. 702⁴ at p. 707, to give notice to the judgment-debtor not to alienate his property and to the public not to accept any alienation from him (cf. the prescribed form of warrant of attachment App. Form 14-C, Civil P. C.). After the attachment the Court proceeds to investigate claims and objections: Rules 58 to 62 of O. 21 prescribe the procedure for dealing with objections by third parties. Order 21 does not contain any specific rules for dealing with objections by judgment-debtors, as these are covered by S. 47 which is in the main body of the Code. But Rr. 58 to 62 would seem to imply that if the judgment-debtor has any objections to the sale of the property attached, he would also be expected to raise them at that stage. There seems to be no good reason why the judgment-debtor should be placed in a better position in this respect than third parties. This view also receives support from the wording of R. 64 of O. 21. Under R. 64 of O. 21, the Court has to make an order that 'any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold'. It seems, therefore, clear that the question as to what property is liable to sale and is to be sold for satisfaction of the decree is intended to be determined by the Court at this stage. Rule 66 provides for notice being given to the judgment-debtor for settling the terms of the sale, when the decree-holder has applied for sale of immoveable property. The subsequent rules provide for the procedure in conducting the sales. After the sale takes place, the rules provide for applications for setting aside the sale on certain grounds and in certain circumstances. These are Rr. 89 to 91. Rules 89 and 91 are not relevant for the purpose of the present reference, but R. 90 is important and to

1. ('30) 17 A. I. R. 1930 Lah. 106 : 121 I. C. 303, Jita Singh v. Ganpat Rai.

2. ('39) 26 A. I. R. 1939 Lah. 113 : 184 I. C. 395 : I. L. R. (1939) Lah. 103 : 41 P. L. R. 486, Ram Chandar v. Sarupa.

3. ('37) 24 A. I. R. 1937 Lah. 309 : 174 I. C. 261, Alam Khan v. Anjuman Imdad Bahmi Qarza.

4. ('85) 7 All. 702 : 1885 A.W.N. 179, Ganga Din v. Khushali.

^a appreciate its true scope, it will be useful to set out its provisions here. The rule is as follows:

"Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

To this rule is added a second proviso by this Court which runs as follows:

^b "Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted."

It will be noticed that this rule allows an application for setting aside the sale on certain grounds only, viz., on the ground of a material irregularity or fraud in publishing or conducting it. It does not obviously cover any objections to the sale on the ground that the property in question was not liable to be sold under S. 60, Civil P. C. As pointed out in 7 All. 641⁵ the word 'conducting' has been used in the Code with reference to the proceedings of the officer conducting the sale and cannot be construed so widely as to cover objections relating to saleability of property. Rule 92 which is supplementary to Rr. 89 to 91 is also important and runs as follows:

^c "(1) Where no application is made under R. 89, R. 90 or R. 91 or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application under R. 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."

^d It will appear from this rule that if no application is made under Rr. 89, 90 or 91 or when such application is made but is dismissed, the Court is bound to make an order confirming the sale and the sale then becomes absolute. Clause (3) of the rule lays down that an order confirming the sale made under this rule cannot be set aside even by a suit. It thus appears that after the sale is effected, the Code does not contemplate any objections to the sale being raised except those covered by Rr. 89, 90 and 91. If any other objections such as those under S. 60, Civil P. C., were permissible at this stage, the rule would not have made it obligatory for the Court to confirm the sale, in the absence, or in the event of dismissal of applications made under Rr. 89, 90 and 91. Section 65 of the Code also deserves mention in this connexion. It lays down that when the sale becomes absolute, the property shall be deemed to have vested in the purchaser from the time when it was sold and not from the time when the sale becomes absolute. This provision also implies that the real sale takes place when

the property is auctioned and it is liable to be set aside only if there are material irregularities or fraud in publishing and conducting the sale, but not otherwise.

The question whether it is open to a judgment-debtor to raise an objection under S. 60, Civil P. C., as to the saleability of the property after the sale has taken place but before its confirmation has to be answered in the light of the above provisions of the Code. The rulings of this Court which represent the conflicting views on this point might be taken to be A.I.R. 1930 Lah. 106¹ and I.L.R. (1939) Lah. 103.² The former is a Single Bench ruling by Tek Chand J., in which it was remarked that it was "settled law that a judgment-debtor who might have raised objections prior to sale as to his property being exempt from attachment and sale under S. 60, but who has refrained from doing so, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable." In support of this view, reliance was placed on the following authorities: 34 Cal. 199,⁶ 40 All. 680,⁷ 28 Bom. 125⁸ and 7 All. 641.⁵ In discussing this ruling and dissenting from it, the Division Bench which decided I. L. R. (1939) Lah. 103² pointed out that three of the rulings viz., 34 Cal. 199,⁶ 40 All. 680⁷ and 28 Bom. 125,⁸ were distinguishable as the objection was raised by the judgment-debtors in those cases after the sale had become absolute on confirmation of the sale. According to the view of the Division Bench, an objection under S. 47 cannot be taken after the confirmation of the sale, because the executing Court becomes 'functus officio.' The Division Bench conceded that the decision in A.I.R. 1930 Lah. 106¹ was fully supported by 7 All. 641,⁵ in which it was laid down that S. 244 of the old Civil Procedure Code (corresponding to S. 47 of the present Code) ceases to apply when the property is auctioned and consequently all objections under that section must be taken before the auction. In "expressing their dissent from this ruling the learned Judges remarked that it seemed to 'miss the circumstance that a judgment-debtor is entitled to apply under S. 47 at any time before the property has been completely disposed of and as no suit is competent, the judgment-debtor is barred by this artificial interpretation of the Code from raising what, under the law, he is entitled to raise so long as the property has not been sold.' The learned Judges pointed out that an application under Sec. 47, Civil P. C., can only be made in the execution proceedings and that no limitation was provided for such an application. They considered it obvious that the application cannot be made after the sale is confirmed as the sale then becomes absolute and the Court is 'functus officio,' i. e., there is no further jurisdiction left in the Court with respect to that particular property. As regards the contrary view that an application under S. 47, Civil P. C., must be made before the auction of the property takes place, the learned Judges observed as follows:

"Is there any reason to hold that the application must be made before the auction of the property takes place? There is nothing in the Code of Civil Procedure or any other Statute to come to

6. (1907) 34 Cal. 199; 5 C. L. J. 294; 11 C. W. N. 513, Dwarka Nath Pal v. Tarini Sankar Roy.

7. (1918) 5 A.I.R. 1918 All. 305; 47 I. C. 947; 40 All. 680; 16 A. L. J. 691, Lala Ram v. Thakar Prasad.

8. (1904) 28 Bom. 125; 5 Bom. L. R. 799, Pandurang v. Krishnaji.

5. (1935) 7 All. 641; 1935 A.W.N. 190, Bamechhaiber Mir v. Bechu Bhagat.

a this conclusion. It is true that under O. 21, R. 84, Civil P. C., the auction is called 'sale,' but it is equally clear that this 'sale' is not absolute until it is confirmed, though, if it is confirmed, title dates back to the date of the auction. It is analogous to the case of a sale deed which has no effect until it is registered. If registration never takes place it is a useless document for purposes of effecting a transfer of the property, but if registration does take place, the transaction dates back to the date of execution of the document. Again, in legal parlance, the word 'sale' denotes 'a completed transaction' and not any preliminary step towards effecting it. This being the state of the law, it seems to me that the Court has power to take notice of any objection under S. 47, Civil P. C., relating to property until the sale of that property is confirmed, as it is not till then that the sale becomes absolute and title passes. It is the duty of the Court to follow the law as long as it can, i. e., as long as it is not functus officio, and under Sec. 60, if the objection of the judgment-debtor is correct, the Court has no jurisdiction to sell the houses. The words of the Proviso are clear that 'the following particulars shall not be liable to such attachment or sale.' Until therefore the sale becomes absolute, it is the duty of the Court to decide the objection made under Sec. 47 to the effect that the property is not liable to sale. The contrary view that such application should be made before sale, is based on the reasoning that, as the auction or sale has taken place, though it is not absolute and is liable to be set aside under O. 21, R. 90, Civil P. C., yet an objection to its liability to sell should be restricted to some time preceding the auction. This argument is based on the reading of O. 21, R. 92 to the effect that when the objections under O. 21, R. 90 are dismissed, the sale shall be confirmed. But S. 47 is completely independent of the provisions of O. 21, relating to the procedure which is to govern the sale of property, and it seems to me that O. 21, R. 92 presupposes that there is no objection outstanding under S. 47 of the Code. When such an objection is made, it is the duty of the Court first to decide it; especially when the objection is that the Court has no jurisdiction to sell the property, such sale being forbidden by Statute and furthermore the judgment-debtor being barred from raising the objection by a separate suit."

The above extract seems to give in a nutshell the reasons of the Division Bench for dissenting from the decision in A. I. R. 1930 Lah. 106¹ and 7 All. 641.⁵ It appears that the opinion of the learned Judges is based on three propositions: (a) There is no limitation prescribed for an application under S. 47, Civil P. C. Executing Court has no jurisdiction to sell property which is exempted under S. 60 and hence an objection to this effect can be made at any time, so long as the executing Court has jurisdiction to deal with the matter: (b) That an execution sale does not become complete till it is confirmed under O. 21, R. 92, Civil P. C., and the executing Court becomes 'functus officio.' An objection under S. 60, Civil P. C., can therefore be taken any time up to the confirmation of the sale. (c) That O. 21, R. 92, Civil P. C., is independent of S. 47 and presupposes that no objection under S. 47 is outstanding at the time of the confirmation of the sale.

As regards the first point, it is true that no limitation is specifically provided for applications falling under S. 47, Civil P. C. But, if the application is one for setting aside a sale, it would seem to come within the purview of Art. 166, Limitation Act. This article was amended in the year 1927 so

as to include applications by a judgment-debtor and I do not see how it can be held that there is no limitation at all for an application for setting aside a sale, which falls within the scope of S. 47, Civil P. C. If an application to the effect that certain property belonging to the judgment-debtor is exempt from attachment or sale under S. 60, Civil P. C., is made after the sale, it must obviously be considered to be an application for setting aside the sale within the meaning of Art. 166, Limitation Act. The judgment-debtor cannot ignore the auction sale on the ground that the Court had no jurisdiction to sell the property, because the Court would have jurisdiction to sell, unless and until the facts showing that the property is exempt from attachment or sale are alleged and proved by the judgment-debtor. If the judgment-debtor fails to allege before the sale facts entitling him to claim exemption under S. 60, Civil P. C.—which lie within his knowledge and the burden of proving which would naturally rest on him—it cannot be said that the Court had no jurisdiction to sell the property and hence the sale was a nullity. It follows, therefore, that if a judgment-debtor does not raise his objection to the sale before the property is sold, his objection to the saleability of the property taken after the sale, must be taken to be tantamount to an application to set aside a sale and as such governed by Art. 166, Limitation Act. The sale referred to in Art. 166 is clearly the auction sale. There can obviously be no question of setting aside a sale, after it has been confirmed and become absolute under O. 21, R. 92, Civil P. C.

The question of limitation under Art. 166 does not, however, arise in the present case as the application was made within 30 days from the date of the sale, as required by Art. 166. But the contention of the petitioner is that the judgment-debtor is now debarred from raising the objection that the property is not liable to be sold under S. 60, Civil P. C., owing to his failure to raise it before the auction sale. It was urged that the judgment-debtor had notice of the attachment and sale and as he failed to raise the objection before the sale, he should be held to be precluded from raising it after the sale either on the principle of constructive res judicata or of estoppel. This contention appears to me to be supported by the observations of their Lordships of the Privy Council in 12 Mad. 19.⁹ In that case, a judgment-debtor had allowed the execution sale of immovables to be completed without objecting to it on the ground afterwards taken viz., that the property was not sufficiently described as required by law. It was held that he could not be allowed to do so. In disposing of the objection their Lordships remarked as follows:

"It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection."

As pointed out in 7 All. 641⁵ the scheme of the Code shows that objections as to the saleability of

9. ('89) 12 Mad. 19; 15 I. A. 171; 5 Sar 265 (P. C.), Arunachalam v. Arunachalam.

the property, etc., should be first disposed of and after the sale the objections should be confined to irregularities or fraud in publishing or conducting the sale. The provisions of R. 92 of O. 21 which make it obligatory for a Court to confirm a sale in the absence of such objections or if such objections are dismissed become otherwise unintelligible. The learned Judges who decided I.L.R. (1939) Lah. 103² have held that S. 47 is completely independent of the provisions of O. 21, R. 90, Civil P. C. But no authority has been cited in support of this proposition and it certainly seems to be opposed to the plain wording of O. 21, R. 92. If the intention of the Legislature was that objections to sale falling under S. 47, Civil P. C., should be independently considered even after the sale, the Legislature might have been expected to make a provision to that effect; but it is significant that no such provision has been made.

Before the auction sale, the judgment-debtor gets notice at first about the attachment of the property under O. 21, R. 54, Civil P. C., and then in connection with the proclamation of sale under O. 21, R. 66, Civil P. C. If the judgment-debtor is duly served but fails to raise any objection, to the proposed sale, I do not see why he should not be held to be debarred from raising the objection later on the principle contained in the observations of their Lordships of the Privy Council quoted above. It has been repeatedly held that although S. 11, Civil P. C., does not apply to execution proceedings, the general principle of res judicata applies to such proceedings including the principle of constructive res judicata embodied in Expl. 4 to S. 11, Civil P. C. In 8 Cal. 51,¹⁰ a judgment-debtor who had notice of a petition for execution failed to raise the objection that it was barred by limitation, with the result that execution was allowed to be taken out. In a subsequent petition for execution, objection was raised that the previous petition was barred by time, but it was held that the objection was barred by the principle of res judicata. It will be observed that in this case there had been no express decision on the question of limitation in the previous execution petition and yet it was held that the objection was barred on the principle of res judicata. There are several decisions of this Court in which this principle of constructive res judicata has been applied to execution proceedings, and I see no good reason why it should not be applied in the present case, A. I. R. 1935 Lah. 200,¹¹ A. I. R. 1933 Lah. 697¹² and A. I. R. 1935 Lah. 949.¹³

It was urged that a Court has no jurisdiction to sell property which is exempt from attachment or sale under S. 60, Civil P. C., and hence the objection ought to be allowed to be raised at any time, as there is no estoppel against a statutory provision. In support of this contention A. I. R. 1935 All. 1016¹⁴ was relied on. But it seems to me that the objection

in the present instance should be held to be barred on the principle of constructive res judicata and not of estoppel. It will be observed that in the decision of their Lordships of the Privy Council, 8 Cal. 51,¹⁰ referred to above, the objection was to limitation. Under S. 3, Limitation Act, a Court has no jurisdiction to entertain a suit or an application, which is barred by time. Yet, the objection as to limitation was held to be barred by the principle of res judicata. It is true that the objection of limitation in that case was as regards a previous application for execution, while in the present case the objection is raised in the same execution proceedings, though at a later stage. But the principle would seem to be applicable even to matters decided in the same proceedings: see 6 All. 269.¹⁵

It was held by a learned Judge of this Court in A.I.R. 1935 Lah. 942¹⁶ and 38 P. L. R. 691¹⁷ that the principle of res judicata will not apply because the Court has no jurisdiction to sell any property which is exempt from sale. But with all respect, I am unable to agree with this view. The question of the Court's jurisdiction does not arise, as already pointed out until and unless the judgment-debtor has alleged and proved the facts entitling him to claim exemption under S. 60, Civil P. C. If the judgment-debtor fails to raise any objection at the time when the issue as to the sale of the property is raised by the decree-holder and the Court then proceeds to order the sale of the property, I do not see why the matter should not be considered to be res judicata. As pointed out already when no objection is raised by the judgment-debtor to the saleability of the property when the issue was raised, the order for sale passed by the Court cannot be said to be without jurisdiction.

In the above aspect of the case, it is unnecessary to consider the question whether the auction sale should or should not be held to be a completed transaction, until the sale is confirmed under O. 21, R. 92, Civil P. C. Because whether it is or is not a completed transaction, the principle of res judicata will bar a judgment-debtor in either case from taking an objection, as to the saleability of property under S. 60, which he could and ought to have taken prior to the sale. It may be however mentioned here that it has been recently held by a Full Bench of this Court, that the 'sale' in execution is deemed to take place on the date on which the auction is held and not on the date on which it is confirmed: see 44 P. L. R. 126.¹⁸

There is one more argument in favour of the view taken above. It was held by their Lordships of the Privy Council in A.I.R. 1931 P. C. 381¹⁹ that an adjustment of a decree between the decree-holder and the judgment-debtor which takes place after the execution sale but before its confirmation, cannot be given effect to because a third party's interests, viz., those of the auction-purchaser intervene. If the sale is to be considered to be incomplete till confirmed and all sorts of objections under S. 60 were held to be admissible till confirmation on that ground, there

10. ('82) 8 Cal. 51 : 8 I. A. 123 : 11 C. L. R. 113 : 4 Sar. 249 (P. C.), Mungul Pershad Dichit v. Grijia Kant Lahiri.

11. ('35) 22 A. I. R. 1935 Lah. 200 : 155 I.C. 286 : 15 Lah. 869 : 35 P. L. R. 429, Prabhu Dayal v. Dewat Ram.

12. ('33) 20 A.I.R. 1933 Lah. 697 : 144 I. C. 488 : 34 P.L.R. 489, Madan Gopal v. Jaswant Rai.

13. ('35) 22 A.I.R. 1935 Lah. 949 : 162 I. C. 208 : 38 P. L. R. 517, Umrac Singh v. Muhammad Abdullah.

14. ('35) 22 A.I.R. 1935 All. 1016 : 158 I. C. 202 : 1935 A. L. J. 1137 : 58 All. 360, Pokhar Singh v. Tala Ram.

15. ('86) 6 All. 269 : 11 I. A. 37 : 1886 A. W. N. 286 (P. C.), Ram Kirpal v. Rup Kuari.

16. ('35) 22 A. I. R. 1935 Lah. 942 : 160 I. C. 749, Mohammad Din v. Hirda Ram.

17. ('36) 23 A.I.R. 1936 Lah. 930 : 38 P.L.R. 691, Ram Chand v. Co-operative Society, Kharar.

18. ('42) 29 A.I.R. 1942 Lah. 102 : 44 P. L. R. 126 (F.B.), Sham Singh v. Vir Bhan.

19. ('31) 18 A. I. R. 1931 P. C. 38 : 130 I. C. 686 : 27 N. L. R. 95 : 58 I. A. 50 (P. C.), Nanhe Lal v. Umrac Singh.

seems to be no good reason why an adjustment of a decree which takes place after sale but before confirmation should also not be given effect to. But their Lordships considered the fact that a third party's interests had intervened to be a sufficient ground for declining to give effect to the adjustment. This would therefore appear to be an additional ground for not allowing a judgment-debtor to raise, after the auction sale an objection under S. 60 as to the saleability of the property, which he could and should have raised before that sale.

The position would be, of course, different if the judgment-debtor were not duly served with notice about the intended auction-sale. In that case the judgment-debtor could not have taken the objection before the sale and consequently the principle of *res judicata* would not apply (*cf.* A.I.R. 1939 Lah. 222²⁰). Similarly, it will not apply if the objection in question did not exist at the time of the sale, but became available later (*cf.* A. I. R. 1938 All. 85²¹). A number of rulings have been discussed in I. L. R. (1939) Lah. 108.² Most of them have been distinguished on the ground that the objection as to the saleability of the property was raised after the confirmation of the sale, when it had become absolute, though it must be said that the decision in some of them at any rate was based not on this ground but on the ground that the judgment-debtor had failed to raise the objection before the auction sale, when he had notice of the proposed sale and could have raised the objection.

As regards the rulings which support the decision in A. I. R. 1930 Lah. 106,¹ it was pointed out that most of them were based on 7 All. 641.⁵ As regards the latter ruling, it was remarked that it missed the point that a judgment-debtor is entitled to apply under S. 47, Civil P. C., at any time before the property is completely disposed of. But as has been pointed out already the question involved is not really one of limitation. The real question which arises in the circumstances of the case is whether the saleability of the property was or was not in issue either expressly or by implication, before the auction sale, and if it was whether the judgment-debtor, having failed to raise the objection at the time, ought not to be held to be debarred from raising it at a later stage. It is true that 7 All. 641⁵ was decided under the old Civil Procedure Code of 1882, but the general line of reasoning adopted therein seems to be applicable to the scheme of the present Code of 1908 also. In fact, there are some significant changes in the present Code which strengthen the view taken by the learned Judges in 7 All. 641.⁵ For instance, the wording of O. 21, R. 64 of the present Code (which corresponds to S. 284 of the Code of 1882) has been altered and it is made clear that the Court has only jurisdiction to order such property to be sold as is "liable to be sold." The question whether the property is or is not liable to sale is thus in issue at the time. Order 21, R. 66 then requires notice about the proclamation of proposed sale to be given to the judgment-debtor as well as the decree-holder. This provision is new and, presumably, it is intended to give the judgment-debtor an opportunity to raise any objection he may have to the proposed sale. Sub-rule (3) of R. 66 is also new. It contemplates an application to be given by the decree-holder for an order for sale of the

property, supported by an affidavit. These changes are important. Under the old Code of 1882, it was held by some Courts that an order under S. 237 (corresponding to O. 21, R. 66) was of an administrative character; but in view of the amendment in the provisions of O. 21, R. 64, Civil P. C., referred to above and the provision for a notice in O. 21, R. 66 I do not see any good reason for holding that the order under R. 66 to be merely of an administrative character. When the decree-holder has made an application for an order for sale of certain property and the judgment-debtor is given notice thereof, I do not see any justification for his not putting forward at once any objections, which he may have to the sale of the property. To allow the judgment-debtor to lie by and raise objections after the sale has been carried out, would seem to be nothing short of abuse of the process of the Court and harassment of the decree-holder. In my opinion, the principles laid down by their Lordships of the Privy Council in 12 Mad. 199⁹ are fully applicable in the circumstances of the case.

It has been held by a Full Bench of the Madras High Court in 46 Mad. 768,³² that a notice issued under O. 21, R. 66, Civil P. C., for settlement of the terms of a proclamation does not bar an objection after the sale by the judgment-debtors to the saleability of the property. In arriving at this conclusion, their Lordships laid stress on the fact that the notice under O. 21, R. 66 was merely for settlement of the terms of the proclamation and, therefore, they were of opinion that the judgment-debtor could not be presumed to know that the question of liability of the property in dispute would also be considered by the Court at the time. With the greatest respect, I must say that I am unable to see why the notice issued under O. 21, R. 66 should not be considered to be sufficient for the purpose. The form of the notice to the judgment-debtor under O. 21, R. 66 is No. 23 in Appendix E, Civil P. C. That form is as follows :

"(Title)

To.....Judgment-debtor.

Whereas in the above-named suit.....
.....the decree-holder has applied for the sale of.....; You are hereby informed.....
that the.....
day of.....19....., has been fixed for settling the terms of the proclamation of sale.

Given under my hand and the seal of the Court this.....day of.....19.....
Judge,"

It will appear from the above form of the notice that the judgment-debtor is thereby informed that the decree-holder has applied for the sale of certain property and is called upon to settle the terms of the proclamation of the sale. One of the terms of the proclamation is the property to be sold : see cl. (a) of sub-rule (2) of Rule 66 and this has to be settled along with other matters. Reading R. 64 with R. 66, it seems clear that the question whether the property sought to be sold is 'liable to sale' is in issue and has to be determined by the Court at the time and hence it seems to me that it is incumbent on the judgment-debtor to raise at once objections to the saleability of property, which he may have at the time. The new provision as regards notice being given to the judgment-debtor before settling the terms of the proclamation was presum-

20. ('39) 26 A.I.R. 1939 Lah. 222 : 41 P.L.R. 553, Sarwan Singh v. Man Singh.

21. ('38) 25 A.I.R. 1938 All. 85 : 173 I. C. 337 ; 1937 A.L.J. 1314, Mt. Aras Bibi v. Mubarak Ali Khan.

22. ('24) 11 A.I.R. 1924 Mad. 1 : 74 I. C. 155 : 46 Mad. 768 : 45 M. L. J. 346 (F. B.), Chidaram Chetty v. Theivanai Ammal.

ably made in order to enable the judgment-debtor to put forward any objections which he may have to the proposed sale and thus enable the Court to dispose off such objections, before the property is sold and a third party's interest, i. e., of the auction-purchaser came into existence: *cf.* A. I. R. 1931 P. C. 33.¹⁹ The object of the notice will, I think, be frustrated, if it is held that the judgment-debtor is not bound to put forward objections to the saleability of the property, although the issue is distinctly raised by the application made by the decree-holder for the sale of the property.

I may notice here a point of distinction between the provisions of the Code of 1882 and the present Code to which the learned Judges of the Allahabad High Court have referred in A.I.R. 1935 All. 1016.¹⁴ while discussing the rule laid down in 7 All. 641⁵ from which they dissented. The learned Judges remarked that an appeal was allowed under S. 284 of the old Code of Civil Procedure of 1882, while the order under O. 21, R. 64 was not appealable. With great respect, I must say that I am unable to appreciate this distinction; for, it does not appear that even an order under S. 284 of the Code of 1882 was appealable as an order. The question whether an order for sale under O. 21, R. 66 (read with R. 64) is or is not appealable would seem to depend upon whether it determines any rights or liabilities as between the decree-holder and the judgment-debtor. If it does, it would obviously fall under S. 47 and be appealable as a decree (*cf.* 45 Mad.L.J. 478²³). If the order determines, e. g., a question as regards the saleability of certain property, I do not see why it should not be appealable under S. 47, Civil P. C., merely because it is passed in the course of the proceeding under O. 21, R. 66 relating to the proclamation of the sale.

Along with R. 66 have to be read Rr. 90 and 92 which I think leave little doubt that the Code does not contemplate any objections being raised after the auction, except such as fall within the scope of R. 90, i. e., objections relating to material irregularities and fraud in publishing and conducting the sale. This is presumably because objections such as those to the liability of the property to be sold are intended to be disposed of before the sale. In my opinion, the provisions for notice under O. 21, R. 66, Civil P. C., has been made with the intention that all objections which the judgment-debtor may have to the proposed sale should be disposed of before the auction takes place. There is one point in respect of the provisions of O. 21, R. 90, Civil P. C., which may be conveniently referred to here. As stated already, a second proviso has been added to this rule by this Court, which is to the effect that the auction sale shall not be set aside on any grounds which the objector could have put forward before the sale was conducted. In A. I. R. 1937 Lah. 309³ it was held by a learned Judge of this Court that a judgment-debtor who fails to put forward an objection as to the saleability of certain property under S. 60, Civil P. C., before the auction sale is precluded from putting forward such objection after the sale by virtue of this proviso. With all respect, I must say that I am unable to concur in this view. A proviso to an enactment creates an exception to the subject-matter of the main portion of the enactment and must be read along with it. Proviso 2 can therefore cover only such objections, which but for the proviso, would be covered by the rule. The rule

refers to objections relating to material irregularities or fraud in publishing or conducting a sale. Consequently, the proviso also must, I think, refer to objections falling under the same category. I am therefore of opinion that this proviso 2 cannot be held to be a bar to objections relating to the saleability of the property. But the bar to such objections after the sale seems to be implied by the provisions of R. 92, which make it obligatory for the Court to confirm a sale when no objections are raised under Rules 89, 90 and 91 or such objections are dismissed.

I am of opinion that the line of reasoning adopted by the learned Judges of the Allahabad High Court in 7 All. 641⁵ not only holds good under the present Code of Civil Procedure, but is in some respects strengthened by the changes introduced therein. When the issue as to the saleability of a certain property is raised and the judgment-debtor receives notice of the attachment and then of the proposed sale under O. 21, R. 66, Civil P. C., and yet raises no objection to the proposed sale (which exists at the time) I do not see any reason why he should be allowed to agitate the question at a later stage after the sale and that too when third person's interests have also intervened. The general scheme of the Code as to execution sale and the provisions of O. 21, R. 92, which contemplate only objections as to irregularities and fraud being raised after the auction sale, are entirely in favour of the decision in 7 All. 641.⁵ That decision is further supported by the principles laid down by their Lordships of the Privy Council in 12 Mad. 19⁹ at p. 25, 8 Cal. 51,¹⁰ 6 All. 269¹⁵ and A.I.R. 1931 P. C. 33.¹⁹ I am therefore of opinion that the judgment-debtor should be held to be debarred from raising the objection in circumstances such as those of the present case on the principle of *res judicata*. I would accordingly answer the question referred to this Bench in the negative.

BECKETT J.—I am in entire agreement with what has been said in the judgment of my learned brother Bhide J. The cases bearing on the subject have all been discussed therein and there is little that I can add. I think that the rules in O. 21, Civil P. C., are clearly based on the assumption that any objections in the way of execution will be raised at the proper time; and more particularly that the liability of property to attachment and sale will be determined before the sale takes place. It seems to me impossible to suppose that it was ever contemplated that an execution Court should be expected to wait until after the sale has taken place before deciding whether it has power to sell the property. The Court is accordingly required by R. 92 to confirm the sale, unless there are any material objections relating to sale itself, which naturally could not be decided at an earlier stage. As regards jurisdiction, the question is not very different from that of limitation. Theoretically, a Court has no power to deal with a stale application for execution; but if proceedings are allowed to go on without objection as to limitation, it may have to be taken as finally decided that the application is within time. These are points which the Court itself has to decide; and if they are once decided, either by express order or otherwise, it cannot be said that the Court has acted without jurisdiction.

There may be cases in which a strict application of R. 92 might work some hardship; but any rules of this kind are subject to the operation of S. 151 of the Code for the purpose of avoiding any real injustice. A Court also has the power of reviewing its own order on proper cause being shown, and there

23. (24) 11 A.I.R. 1924 Mad. 385; 77 I.C. 148; 45 M.L.J. 478, *Vedaviasa Aiyar v. Madura Hindu Labha Nidhi Co.*

a are cases in which the Privy Council has allowed execution proceedings to be re-opened in review, when there has been no proper representation of the party affected. If the rules are read in this light along with the provisions of the Code itself, the position is that a party must show good cause for standing by and allowing a sale to take place before he can be allowed to say that the sale should not have taken place at all. If he had ample opportunity for raising any such objection, and the grounds for making such an objection were within his own personal knowledge, there seems to be no good reason why the sale should be upset on such grounds either before or after confirmation. For these reasons I agree with the answer proposed.

b TEK CHAND J.—I agree with my learned brother Bhide J., that the question referred to the Full Bench must be answered in the negative. The identical question arose in A. I. R. 1930 Lah. 106¹ before me sitting in Single Bench, when following 7 All. 641⁵ and other rulings I ventured to hold that a judgment-debtor who, prior to the sale, might have raised objection that the property was exempt from attachment or sale under S. 60, but who had refrained from doing so, could not after the sale had been carried out, prefer the objection that the property was not legally saleable. After hearing very full arguments in the present case and giving respectful consideration to the reasons given in I.L.R. (1939) Lah. 103² for the contrary conclusion, I feel strengthened in the view taken in A.I.R. 1930 Lah. 106.¹ My learned brother has discussed in detail the grounds on which the decision in I.L.R. (1939) Lah. 103² was based and as I agree generally with the reasons given by him for not accepting them I do not think it necessary to discuss that case in detail. The question has since been considered in various Courts. The Bombay High Court has held in 58 Bom. 564²⁴ at p. 569 that an objection that the judgment-debtor was an agriculturist and, therefore, his house was not liable to attachment or sale under S. 60 (c), Civil P. C., was one which the appellant could and should have raised before the sale and as he did not do so he could not be allowed to raise it after the sale. The Patna High Court in A. I. R. 1941 Pat. 440,²⁵ the Oudh Chief Court in 1942 O. W. N. 23²⁶ and the Nagpur Court in A.I.R. 1934 Nag. 82²⁷ have also reached the same conclusion.

a The only decision, other than I.L.R. (1939) Lah. 103,² in which the contrary view has been taken is 58 All. 360¹⁴ where a Division Bench of the Allahabad High Court distinguished 7 All. 641⁵ and the other cases which followed it on two grounds: (1) that O. 21, R. 64 is differently worded from S. 287 of the Code of 1882, and (2) that an order passed under S. 287 of the Code of 1882 was appealable whereas a similar order under O. 21, R. 64 is not appealable under the Code of 1908. With the greatest respect, both these grounds appear to have been based on a misapprehension. In R. 64 of O. 21, the words "and liable to sale" have been added: they did not appear in S. 287 of the earlier Code. But

24. ('34) 21 A.I.R. 1934 Bom. 348 : 153 I. C. 899 : 58 Bom. 564 : 36 Bom. L. R. 681, Sakar Lal Jamna Das v. Jerbai Sorabji Patel.

25. ('41) 28 A. I. R. 1941 Pat. 440 : 193 I. C. 124, Chandra Sekhar v. Bhagwan Das.

26. ('42) 29 A.I.R. 1942 Oudh 808 : 199 I. C. 456 : 1942 O. W. N. 23, Sheo Shankar Lal v. Mt. Bittan Kaur.

27. ('34) 21 A. I. R. 1934 Nag. 82 : 148 I. C. 200 : 30 N. L. R. 135, Sobha Khushal v. Chhaganbai.

this change clearly brings out the question of the saleability of the property sought to be sold, so that the judgment-debtor may object that the "order of sale" be not passed as the property is not liable to sale. As regards the second ground, the order, if it determines the rights of the parties and is not purely of interlocutory character deciding a mere matter of procedure, was appealable under S. 244 of the old Code : see 4 C. L. R. 27,²⁸ and it is equally appealable under S. 47 of the present Code. The learned Judges in the Allahabad case also laid emphasis on the fact that S. 60 contained a statutory provision exempting certain properties from attachment or sale and that the section should not be interpreted so as to make these words superfluous. But with great respect, here again the question is not of ignoring the provisions of S. 60 so as to render them superfluous, but it really is, at what stage should the objector, within whose peculiar knowledge the necessary facts are, should raise the objection. To this matter the rule laid down by their Lordships of the Privy Council in 8 Cal. 511¹⁰ and 12 Mad. 199⁹ clearly applies. Following that rule it must be held that where the order for sale is passed under O. 21, R. 64 after notice had been given to the judgment-debtor and he has not objected that the property is not liable to sale, and in furtherance of that order the property has been sold, the judgment-debtor is precluded from questioning the propriety of that order and impugning the sale on the ground which he might and ought to have taken before sale.

G.N./R.K.

Answered in negative.

28. ('79) 4 C. L. R. 27, Chandhasi Sital Prasad v. Jhumah Singh.

C. P. C.—

(a) ('40) Chitaley, S. 47, N. 45 Pt. 2 and S. 60, N. 10. ('41) Mulla, Page 188 Pt. (m).

(b) ('40) Chitaley O. 21, R. 54 N. 1 Pts. 2 and 3.

(c) ('41) Mulla, Page 832 Pt. (r).

(c) ('40) Chitaley, O. 21 R. 90, N. 2 Pt. 12.

(d) ('41) Mulla, Page 889 Pt. (j) and page 895 Note "Questions outside the scope of this rule."

(d) ('40) Chitaley, O. 21 R. 92 N. 2.

(e) ('41) Mulla, Page 899 Pt. (y).

(e) ('40) Chitaley, S. 47, N. 88 Pt. 7 and S. 60 N. 23.

(f) ('41) Mulla, Page 188 Pt. (k), page 199 Note "Limitation" and page 249 Pt. (c).

(f) ('40) Chitaley, S. 47 N. 2.

(g) ('41) Mulla, Page 188 Note "Objections to . . . representations."

(g) ('40) Chitaley, S. 11, N. 23 Pts. 3 and 5a.

(h) ('41) Mulla, Page 89 Pt. (v) page 90 Pt. (e).

(h) ('40) Chitaley, S. 11, N. 23 Pts. 14 and 17b, S. 60 N. 23 and O. 21 R. 66 N. 2 and N. 22.

(i) ('41) Mulla, Pages 88 et. seq. Note "Orders in execution proceedings" and page 249 Pt. (c).

(i) ('40) Chitaley, O. 21, R. 92, N. 2.

(j) ('41) Mulla, Page 899 Note "Shall make . . . the rule."

(j) ('40) Chitaley, O. 21 R. 66 N. 20 Pt. 10.

(k) ('41) Mulla, Page 857 Note "Appeal."

(k) ('40) Chitaley, S. 151 N. 2 Item 10 "Setting aside execution sales" and O. 21 R. 92 N. 2.

(l) ('41) Mulla, Page 475 et. seq. Note "Inherent powers of Court."

Limitation Act—

(c) ('42) Chitaley, Art. 166, N. 2 Pt. 4.

(c) ('38) Rustomji, Page 1590 Pt. 2.

A. I. R. (29) 1942 Lahore 162 (1)

BHIDE J.

Ghulam Qadar — Appellant

v.

Allah Din and others — Respondents.

First Appeal No. 116 of 1941, Decided on 9th February 1942, from order of Senior Sub-Judge, Sialkot, D/- 4th April 1941.

Guardians and Wards Act (1890), Ss. 7, 9 and 39—Applicant for appointment as guardian of minor's property need not reside within district in which property is situated—Power under S. 39 to remove guardian not residing within district in which property is situate is discretionary.

Under the Guardians and Wards Act, it is not essential that a person who applies for being appointed guardian of the property of a minor should be a resident of the district in which the property of the minor is situated. The power of the Court under S. 39 to remove a guardian who is not residing in the district within which the property is situated is, however, discretionary, and it cannot reasonably be inferred therefrom that the applicant must necessarily be a resident of the district in which the property is situated : ('33) 20 A. I. R. 1933 All. 780, *Rel. on* ; ('14) 1 A. I. R. 1914 All. 541 and ('28) 15 A. I. R. 1928 Lah. 716, *Not foll.* [P 162 C 1, 2]

D. L. Kohli — for Appellant.

Mohammad Din Jan — for Respondents 1 to 3.

JUDGMENT.—This is an appeal from the order of the Senior Subordinate Judge, Sialkot, dismissing an application for the appointment of a guardian. The sole ground on which the application was dismissed was that the applicant was not a resident of the district in which the property of the minor was situated. It may be mentioned here that the applicant had applied for guardianship of the person of the minor as well but that part of the application is no longer pressed. It is, therefore, only necessary to decide whether under the Guardians and Wards Act it is essential that a person who applies for being appointed guardian of the property of a minor should be a resident of the district in which the property of the minor is situated. The learned Senior Subordinate Judge has himself stated in his order that the Act does not require that a person applying for the guardianship of the property of the minor should be a resident of the district in which the property is situated. He has, however, relied on the provisions of S. 39 of the Act, which give power to the Court to remove a guardian who is not residing in the district within which the property is situated. This power is, however, discretionary and it cannot reasonably be inferred therefrom that the applicant must necessarily be a resident of the district in which the property is situated. The learned Senior Subordinate Judge has referred to A. I. R. 1928 Lah. 716¹ which purports to follow a Division Bench ruling of the Allahabad High Court reported in 36 All. 280,² but this ruling was subsequently dissented from in a later ruling of the Allahabad

1. ('28) 15 A. I. R. 1928 Lah. 716 ; 107 I. C. 606, *Mt. Lachhmi v. Nanak Chand.*

2. ('14) 1 A. I. R. 1914 All. 541 ; 24 I. C. 59 ; 36 All. 280 ; 12 A. L. J. 392, *Asghar Ali v. Amina Begam.*

High Court reported in A. I. R. 1933 All. 780.³ The learned counsel for the respondents frankly admitted that he could not support the view taken by the learned Senior Subordinate Judge and that it was not essential that the applicant for guardianship of the property of a minor should be a resident of the district in which the property is situated.

The learned counsel for the respondents urged that there was really no case for appointment of a guardian of the property of the minor in this case as the property was being satisfactorily managed by the respondents. The learned Senior Subordinate Judge has, however, given no finding on the merits. In the circumstances I must accept this appeal and setting aside the order of the Senior Subordinate Judge remand the case to him for decision on the merits. The parties are directed to appear before the learned Senior Subordinate Judge on 23rd February 1942. Costs will follow final decision.

G.N./R.K.

Appeal accepted.

3. ('33) 20 A. I. R. 1933 All. 780 ; 147 I. C. 217 ; 56 All. 20 ; 1933 A. L. J. 1333, *Beni Prasad v. Mt. Parwati.*

A. I. R. (29) 1942 Lahore 162 (2)

TEK CHAND AND BECKETT JJ.

*Mohammad Bakhsh — Defendant —**Appellant*

v.

Shahu and others, Plaintiffs and another, Defendant — Respondents.

First Appeal No. 208 of 1940, Decided on 24th February 1942, from decree of the Sub-Judge, First Class, Gujrat, D/- 26th March 1940.

(a) Civil P. C. (1908), O. 17, Rr. 1 and 2—Date fixed for scrutiny of processes is not one for hearing of case—Attendance of parties on that date is not compulsory—Court cannot order defendant to pay costs for his failure to appear on that date.

The Court cannot impose an order of costs on the defendant for his failure to appear on the date fixed for scrutiny of processes, which is not a date fixed for the hearing of a case and on which the attendance of the parties is not compulsory, since the object of such a date is to enable a Court to ascertain whether the case is likely to be ready for trial on a date next fixed for hearing. There is no rule of procedure which enables a civil Court to impose fines on a party in this manner. [P 163 C 2]

(b) Practice—Trial of cases—Duty of Court—Trial should be expedited and no concession should be given to party not exercising due diligence—Court's help should be obtained for securing attendance of witnesses.

While it is desirable that every effort should be made to expedite the trial of cases, and no concession should be made to a party who does not exercise due diligence, it has to be remembered that witnesses are not always under the influence of the party by whom they are called and it may be necessary to secure the help of the Court in securing their attendance; and it is equally undesirable that the cases should be expedited at the cost of substantial justice. [P 163 C 2]

(c) Civil P. C. (1908), O. 17, R. 1—Costs of adjournment—Costs should be such as can

reasonably be said to have been occasioned by adjournment — They should not be punitive — Nor should they be awarded against party not substantially at fault in matter of adjournment.

An order for costs of adjournment must be an order within the meaning of O. 17, R. 1 that is, the costs must be such as can reasonably be held to be occasioned by the adjournment and as might reasonably compensate the other party for any expense to which they might be put by the adjournment. Costs should not be in the nature of a penalty or punishment, nor should costs be awarded against a party who is not substantially at fault in the matter of an adjournment: (15) 2 A. I. R. 1915 Lah. 476, *Rel. on.* [P 163 C 2]

Veda Viyasa — for Appellant.

Khurshid Zaman — for Respondents.

BECKETT J.—The plaintiffs sued as collaterals for a declaration that their reversionary rights be not affected by a transfer of land made by Mt. Jawai, a widow, in favour of Mohammad Bakhsh, who pleaded that the transaction was for necessity and was within the widow's power of alienation. The consideration for the transfer was mainly made up of two sums of Rs. 4000 each said to have been paid to creditors named Amir Chand and Jowala Das. In order to prove necessity for the transfer and the fact of these payments the defendant wished to secure the evidence of Mt. Jawai, who was called upon to produce the original receipts and of the creditors to whom the payment has been said to have been made. There was some considerable difficulty in securing this evidence either because the witnesses could not be served or because those who appeared could not give their evidence until the receipts had been produced. The learned Subordinate Judge seems to have taken the view that the defendant was responsible for this delay, from a desire to prolong the proceedings, but it is difficult to say on what ground his view was based, for the defendant had nothing to gain by delay, since he would in any case be entitled to retain the land during the lifetime of the widow and the process-serving reports indicate that some of the witnesses could not be found within the time allowed. Certain interlocutory orders were passed with regard to the production of further evidence, and these were sought to be made the subject of revision by this Court. When the matter came up for hearing on 15th January 1940, it was held that the orders were not open to revision at this stage, being merely interlocutory; but it was further observed that the orders in question appeared to be unreasonable and that the Court would be well advised in the circumstances of the case to grant an adjournment and permit all the witnesses to be summoned again for a date by which service could be effected, costs being allowed to the plaintiffs.

On receipt of this order, the Subordinate Judge proceeded to grant an adjournment, but passed an order requiring the defendant to pay a sum of Rs. 100 as costs to the plaintiffs before he would be allowed an opportunity to produce his evidence. The defendant failed to comply with this order and the case was decided against him. He has come up in appeal against the decree. If the original orders were unreasonable, the orders since passed seem to have less justification. When it was observed that it would be open to the Court to pass an order of costs, if necessary, this obviously meant an order for the payment of such sum as might reasonably compensate the other party for any expense to which they might be put by the adjournment. The

sum actually ordered to be paid cannot possibly be regarded in this light, and can only be treated as an extremely heavy fine imposed on the defendant for his supposed misdemeanour in deliberately protracting the proceedings. It may here be observed that the Court had already imposed an order of costs on the defendant for his failure to appear on the date fixed for scrutiny of processes, which is not a date fixed for the hearing of a case and on which the attendance of the parties is not compulsory, since the object of such a date is to enable the Court to ascertain whether the case is likely to be ready for trial on a date next fixed for hearing. There is no rule of procedure which enables a civil Court to impose fines on a party in this manner; and even if there were, there does not appear to be any sufficient justification for imposing it, as pointed out above.

In these circumstances, we are of opinion that the conduct of the case has been influenced in a manner detrimental to the defendant by the passing of orders which were in substance without jurisdiction, quite apart from the validity of the reasons on which they were founded. While it is desirable that every effort should be made to expedite the trial of cases, and no concession should be made to a party who does not exercise due diligence, it has to be remembered that witnesses are not always under the influence of the party by whom they are called and it may be necessary to secure the help of the Court in securing their attendance; and, it is equally undesirable that the cases should be expedited at the cost of substantial justice. The appeal will accordingly be accepted and the case will be remanded for a fresh decision, after the defendant has been given a reasonable opportunity to produce his evidence. The orders for costs already passed are set aside; and if the trial Court considers any fresh order for costs necessary, this must be an order within the meaning of O. 17, R. 1, Civil P. C.: that is, the costs must be such as can reasonably be held to be occasioned by the adjournment and should not be in the nature of a penalty or punishment, nor should costs be awarded against a party who is not substantially at fault, in the matter of an adjournment: see A. I. R. 1915 Lah. 476.¹ Since the Subordinate Judge by whom the case was decided is said to have been transferred, the case will now be sent to the Senior Subordinate Judge of the district, before whom the parties have been directed to attend on 23rd March 1942. Costs so far incurred will abide the event.

G.N./R.K.

Order accordingly.

1. (15) 2 A.I.R. 1915 Lah. 476 : 29 I.C. 137 : 126 P.L.R. 1915, Mt. Umat-ul-Mughni Begum v. Salig Ram.

C. P. C. —

(a) ('40) Chitaley, O. 17 R. 1, Note 5 and R. 2 Note 4.

(b) ('40) Chitaley, O. 16 R. 1, Notes 2 and 4.

(c) ('41) Mulla, Page 696 Note "Whether witness-summons can be refused."

(c) ('40) Chitaley, O. 17 R. 1, Note 5 Pts. 2 and 11.

a A. I. R. (29) 1942 Lahore 164 (1)

BECKETT J.

Nawab — Judgment-debtor — Appellant
v.

Moti Ram — Decree-holder — Respondent.

Exn. Second Appeal No. 959 of 1941, Decided on 4th February 1942, from decree of the Dist. Judge, Lyallpur, D/- 28th March 1941.

(a) Punjab Relief of Indebtedness Act (7 of 1934), S. 13—Board has no power to pass order of discharge in any circumstances — Whether debt should be deemed to have been discharged because of any failure on decree-holder's part is for executing Court to decide — In case of such failure no order of Board for discharge of debt is necessary — There is no provision for further discharge after revival.

There is nothing in the Act which gives the Board power to pass an order of discharge in any circumstances at all. What is actually provided in S. 13 is that if a statement of debts is not submitted in time, the debt shall for all purposes be deemed to have been duly discharged. It is thus for the executing Court to decide whether the debt should be deemed to have been discharged by reason of any failure on the part of the decree-holder, or not. If there has been any such failure, no order of the Board for discharge of the debt is necessary. On the other hand, if there has in fact been no failure it is not in the power of the Board to discharge the debt. Even if the debt has been discharged, there is a further provision that either the Board may revive it on good cause being shown, and there is nothing in the Act to provide for any further discharge after revival. [P 164 C 2]

(b) Punjab Relief of Indebtedness Act (7 of 1934), S. 13 (1) — No statement submitted by decree-holder on date originally fixed — Time extended — Submission of further statement within extension is sufficient compliance with Section 13.

Where no statement is submitted by the decree-holder under S. 13 on the date originally fixed and time is extended by the Board, a submission of a further statement by the decree-holder within the period of extension would be sufficient compliance with the provisions of S. 13 (1) and there would be no discharge of the debt. [P 164 C 2]

d S. L. Puri — for Appellant.

Ajit Ram and Narinder Singh —
for Respondent.

JUDGMENT.—It becomes necessary to accept this second appeal because the Courts below do not appear to have viewed the matter from the correct angle. The appeal has arisen in execution proceedings. After the decree-holder had obtained his decree, the judgment-debtor made an application to the local Debt Conciliation Board for settlement of his debts. It is said that the decree-holder did not submit a statement of debts on the date originally fixed, but he was subsequently allowed to take part in the proceedings before the Board. Eventually, when the decree-holder refused to accept the settlement proposed by the judgment-debtor, the Debt Conciliation Board passed an order purporting to discharge the debt on the ground that the decree-holder had failed to file his statement of debt in time. This order has now been put forward by the judgment-debtor as a bar to any further proceedings

in execution. The issues before the executing Court appear to have been framed on the assumption that the Board had power in the ordinary way to pass such an order of discharge and that the real question is whether the Board had acted correctly in passing such an order after allowing the decree-holder to take part in the Board proceedings. The lower appellate Court has held that the Board had no power to pass such an order of discharge when time had been extended and that the execution Court had power to go behind the order of the Board.

The form of this finding, as already indicated, suggests that the Board had power to pass an order of discharge in certain circumstances. As a matter of fact, there is nothing in the Punjab Relief of Indebtedness Act, 1934, which gives the Board power to pass an order of discharge in any circumstances at all. What is actually provided in S. 13 is that if a statement of debts is not submitted in time, the debt shall for all purposes be deemed to have been duly discharged. It is thus for the executing Court to decide whether the debt should be deemed to have been discharged by reason of any failure on the part of the decree-holder, or not. If there has been any such failure, no order of the Board for discharge of the debt is necessary. On the other hand, if there has in fact been no failure it is not in the power of the Board to discharge the debt. Even if the debt has been discharged, there is a further provision that either the Board may revive it on good cause being shown, and there is nothing in the Act to provide for any further discharge after revival.

The real question that needs to be decided is thus twofold. In the first place, there is the question whether there was any failure on the part of the decree-holder to submit a statement of debts as required by S. 13 in time. It appears that no such statement was submitted on the date originally fixed, but the Board has power to extend the time. If time was extended, and if a further statement was submitted within the period of extension, then there would be sufficient compliance with the provisions of sub-s. (1) and there would be no discharge of the debt. Secondly, even if the debt had been discharged, it would still be within the power of the Board to revive it; and if the debt was once revived by the Board, it is not clear whether it could again be discharged as it is not certain what has actually happened in the present case, the appeal will be accepted, and the proceedings will be remanded to the executing Court for a fresh decision on the merits after proper issues have been struck on the question whether the debt has been either discharged or revived, as a question of fact which it is for the executing Court to decide. Costs will abide the event, and stamp duty on this appeal will be refunded.

G.N./R.K.

Appeal accepted.

A. I. R. (29) 1942 Lahore 164 (2)

DALIP SINGH AND DIN MOHAMMAD JJ.

Mt. Jawali daughter of Sant Singh and
another — Plaintiffs — Appellants
v.Lal Singh, represented by Tara Singh
and others — Defendants —

Respondents.

Second Appeal No. 337 of 1939, Decided on 18th November 1941, from decree of Addl. Dist. Judge, Amritsar, D/- 14th March 1939.

(a) Custom (Punjab) — Manual of customary law — Weight to be attached to compiler's remarks stated — Customary law of Amritsar District compiled in 1913-14—Answer to questions 60 and 61 that even in case of self-acquired property daughters were excluded by collaterals — Due weight must be attached to compiler's remark that practice was not in consonance with reality in view of fact that earliest record made no mention of succession to self-acquired property of sonless owner and daughters therefore could not be said to have been excluded in such succession—So far as manual of customary law is concerned, it neither definitely goes against daughters nor clearly helps collaterals in matter of succession to self-acquired property.

Whatever weight may be attached to the compiler's remarks in the manual of customary law they are not sufficient to rebut the presumption arising from entries recorded in the *riwaj-i-am*, especially when they are in accord with the earlier *riwaj-i-am*. A departure from the old customary law may be discredited if the compiler thinks that the change was being introduced for a set purpose. But if the replies are in consonance with what had been the custom from time immemorial, the compiler's personal opinion that the rules were not being rigidly observed in practice will neither discredit the replies given nor lighten the burden on those who are required by the law to rebut the entries made in the manual of customary law: ('41) 28 A. I. R. 1941 Lah. 78, *Rel. on*; ('35) 22 A. I. R. 1935 Lah. 419; ('35) 22 A. I. R. 1935 Lah. 428; ('35) 22 A. I. R. 1935 Lah. 985 and ('36) 23 A. I. R. 1936 Lah. 88, *Ref.* [P 167 C 1]

The earliest record of customary law of Amritsar District makes no mention of the self-acquired property in the matter of succession to a sonless owner and it cannot be said therefore that the daughters had been excluded in the matter of such succession. This state of affairs continued up to 1913-1914 when in the *riwaj-i-am* of that year in answer to questions 60 and 61 it was stated by the representatives of the tribes consulted that even in the case of self-acquired property daughters were excluded by the collaterals however remote. This reply was not considered even by the compiler to be truly representative of the practice among the various tribes. Due weight must be attached to his remark that the reply was not in consonance with reality. (Reasons for attaching due weight stated.) [P 166 C 2; P 167 C 1]

So far as the manual of customary law is concerned, it cannot be said with any reasonableness that it definitely goes against the daughters or that it clearly helps the collaterals in the matter of succession to self-acquired property. [P 167 C 2]

(b) Custom — Proof of — Judicial decisions based on instances can be relied on.

For the purpose of proving a custom judicial decisions if based on instances can be relied on: ('41) 28 A. I. R. 1941 P. C. 21, *Rel. on*. [P 167 C 2]

(c) Custom (Punjab)—Hundal Jats of Amritsar District—Self-acquired property of father—Daughters exclude collaterals—Initial onus is on collaterals to show that general custom in favour of daughters has been varied by special custom excluding daughters — Collaterals held failed to establish that they excluded daughters.

According to the custom prevailing among the Hundal Jats of Amritsar district, collaterals of

father are excluded by his daughters in the matter of succession to his self-acquired property. The initial onus is on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a special custom excluding the daughters. (In spite of a few decisions in their favour, collaterals held failed to establish that they excluded the daughters from inheriting their father's self-acquired property): ('41) 28 A. I. R. 1941 P. C. 21, *Rel. on*; *Case law discussed*. [P 168 C 2]

(d) Custom (Punjab) — Succession — In absence of custom personal law must be applied — Hundal Jats of Amritsar district — Neither under custom nor according to Hindu law brother's daughters do not exclude collaterals.

In the matter of succession, in the absence of custom the personal law of the parties must be applied. Neither under custom nor according to Hindu law, in the matter of succession, among the Hundal Jats of Amritsar district brother's daughters do not exclude collaterals. [P 168 C 2; P 169 C 1]

M. C. Mahajan — for Appellants.

J. N. Aggarwal, Kharak Singh, P. N. Kaul and J. L. Kapur — for Respondents.

DIN MOHAMMAD J.—This appeal has arisen out of a suit instituted by Mt. Jowali and Mt. Phinno, daughters of Sant Singh, for a declaration that they were entitled to succeed to the land in suit in preference to the defendants. The suit was resisted on various grounds. It was contended *inter alia* that the plaintiffs as daughters of Sant Singh did not oust the defendants who were his collaterals and that the land was ancestral. The trial Court came to the conclusion that the land was non-ancestral and further found that the defendants were related to Sant Singh in the 11th degree but holding that under the *riwaj-i-am* prevailing in the district of Amritsar daughters were not preferred to collaterals even in the case of non-ancestral land, it dismissed the suit with costs to the contesting defendants. From this order an appeal was taken to the Court of the District Judge but he also agreed with the decision of the Court below and dismissed the appeal with costs. The main arguments urged on behalf of the appellants are that inasmuch as, in the first instance, the contention raised by the defendants was opposed to the general customary law of the province as contained in para. 23 of Rattigan's Digest of Customary Law, the onus should not have been placed on the daughters; secondly, that even if in view of the entry found in the customary law of the district as compiled in 1913-14 the onus was properly placed on the plaintiffs, it shifted on to the defendants inasmuch as there were no instances mentioned in the manual of customary law in support of the answers recorded there; and the compiler himself had doubted their correctness; thirdly, in view of the recent Privy Council judgment as reported in I. L. R. (1941) Lah. 154 the onus on the plaintiffs was very light and was amply discharged by the judicial instances found in the various authorities of this Court; and fourthly, that, in any circumstances, the customary manual as prepared in 1940 entirely goes in favour of the plaintiffs and on that score alone the judgments of the Courts below cannot be maintained.

Counsel for the respondents on the other hand urges that para. 23 of Rattigan's Digest of Custo-

1. ('41) 28 A. I. R. 1941 P. C. 21; 198 I. C. 436; I. L. R. (1941) Lah. 154; I. L. R. (1941) Kar. P. C. 22; 68 I. A. 1 (P. C.), Mt. Subhani v. Nawab.

mary law does not in any way displace the custom as recorded in the manual of Customary law relating to the various tribes residing in a certain district; that the judicial instances weigh more on the side of the defendants than on that of the plaintiffs; that the manual of customary law as prepared in 1940 could not be invoked in the present case inasmuch as the succession here had opened long before the manual was compiled; and that, at any rate, the plaintiffs could, in no circumstances, succeed to the property belonging to Man Singh as qua him they did not occupy the position as daughters but that of brother's daughters who are not even remotely referred to as heirs either under Hindu law or under customary law. In order to appreciate the last point raised by the respondents' counsel, it will be necessary to give a brief history of the devolution of this property. It originally belonged to one Buta Singh who died in 1907 leaving him surviving his two sons, Man Singh and Sant Singh. They both died in May 1909, the former leaving behind him his widow, Mt. Basant Kaur, and the latter his widow, Mt. Askaur, and the two daughters, Mt. Jowali and Mt. Phinno. The widows succeeded to the estates of their husbands and on Mt. Askaur's death, which took place on 2nd June 1930, her estate was mutated in favour of Mt. Basant Kaur in preference to her daughters. Mt. Basant Kaur died in May 1936 and the present contest arose. The present plaintiffs laid claim to the whole of the property on the ground that it belonged to their father Sant Singh who had died after Man Singh and the defendants resisted their claim on the ground that even if they were treated as daughters of Sant Singh, the collaterals, however, remote, excluded them. The decision of the revenue authorities finally went in favour of the defendants and hence the necessity of this suit.

The earliest record of the *riwaj-i-am* is contained in a manual prepared in vernacular in 1865. So far as Hundal Jats are concerned, to which tribe the present parties belong, no question appears to have been put to them as to the right of a daughter to succeed to the self-acquired property of her father in preference to his collaterals; but in answer to question 9 which related to the power of a male proprietor to make a gift of his property to his daughters on the occasion of her marriage or otherwise, the representatives of the Hundal tribe said that a male proprietor could during his life-time make a gift of his self-acquired property to his daughter or her husband on the occasion of her marriage and that this gift need not be in writing. It was further added that if the daughter or the son-in-law came into possession of the property other than that gifted to the daughter on the occasion of the marriage, their possession could not be disturbed even after the death of the original proprietor, provided he publicly made a writing in their favour. In 1892, an abstract of this manual was prepared and translated into English. In 1913-1914, a regular survey was made by the Assistant Settlement Officer under the direct supervision of the Settlement Officer and the result was a comprehensive customary law in the shape of the present manual. Questions 60 and 61 related to the succession of daughters. The answer to question 60 was recorded in the following terms:

"According to the *riwaj-i-am* of 1865 sons exclude daughters. But nothing is said as to agnates. Nearly all tribes state that daughters are excluded by male lineal descendants through males and by the widow or widows of the deceased. Similarly, nearly all of

them say that agnates, however remote, exclude daughters."

A few exceptions were appended to this answer but Hundal Jats are not included among them. A note follows those exceptions, which runs in the following manner:

"The exclusion of a daughter is so strict that even in those cases where there is no agnate at all, she is deprived of succession by members of the village community who may have no relationship at all with the deceased. The real fact is that daughters after their marriage often go to reside far away from their father's village and amongst families with whom her father's brother-hood has no sympathy. The result is that on her father's death she fails to get possession of his property and cannot get any support from the people of his village, even if she has the courage to lodge a suit in the Courts. The practice of some revenue officers to make mutations invariably follow possession, referred to in 5 P. R. 1912 Rev.² frequently prevents daughters succeeding to their father's property, when entitled to do so."

This is followed by a remark to the following effect:

"The feeling against daughters is so strong among the Sidhu Jats of Atari, Bal Jats of Amritsar Tehsil, Khattris and Brahmans of Neshta and Manj Rajputs of Manj, that agnates, however remote, are said not to allow unmarried daughters to keep possession till their marriage or death. This is rather a prejudice than a true statement of custom. All other tribes allow such possession to unmarried daughters if no son or widow is alive."

Question 61 was worded as follows:

"Is there any distinction as to the rights of daughters to inherit (1) the immovable or ancestral, (2) moveable or acquired, property of their father?"

To this a reply was attached, which reads as follows:

"All tribes—

No distinction is made, and the answers to question 60 are applicable. But in reality daughters have a right to exclude agnates with respect to non-ancestral property, though the right is seldom asserted for the reasons given under answer 60."

In the preface to this manual the compiler stated that where the answers showed that a change in custom had taken place since 1865, the change was, so far as possible, noted under the various questions. In the case of questions in regard to which no particular case in point was cited by the people and no judicial decisions or mutations could be traced, the answers represented nothing more than the personal opinion of the persons consulted and could not carry the same weight as answers supported by cases. In the introduction to this manual, specific reference was made to daughters and it was said that as regards daughters the custom was anything but uniform; the general trend of opinion was that daughters succeeded to the non-ancestral property to the exclusion of agnates but never succeeded to the ancestral property in the presence of near agnates. It would thus appear that so far as recorded custom was concerned, the defendants are not in a position to assert that it favours them unmistakably and unequivocally. As stated above, the earliest record made no mention of the self-acquired property in the matter of succession to a sonless owner and it cannot be said therefore that the daughters had been excluded in the matter of such succession.

2. (12) 5 P. R. 1912 Rev. : 17 I. C. 979 : 35 P. L. R. 1913, Ghulam Muhammad v. Zewaro.

^a This state of affairs continued up to 1913-14 when in clear terms it was stated by the representatives of the tribes consulted that even in the case of self-acquired property daughters were excluded by the collateral however remote. This reply was not considered even by the compiler to be truly representative of the practice among the various tribes and he consequently remarked that the reply was not in consonance with reality.

The question as to what weight should be attached to the remarks made by a compiler has been the subject of various decisions in this Court: see among others A.I.R. 1935 Lah. 419,³ A.I.R. 1935 Lah. 428,⁴ A. I. R. 1935 Lah. 985⁵ and A.I.R. 1936 Lah. 88.⁶ In a recent case, while sitting with Bhide J., I had also occasion to consider this matter in Regular First Appeal No. 402 of 1938⁷ and after discussing some of the authorities referred to above I remarked as follows:

^b "In my opinion, however, whatever weight may be attached to the compiler's remarks, they are not sufficient to rebut the presumption arising from the entries recorded in the *riwaj-i-am*, especially when they are in accord with the earlier *riwaj-i-am*. A departure from the old customary law may be discredited if the compiler thinks that the change was being introduced for a set purpose. But if the replies are in consonance with what had been the custom from time immemorial, the compiler's personal opinion that the rules were not being rigidly observed in practice will neither discredit the replies given nor lighten the burden on those who are required by the law to rebut the entries made in the manual of customary law."

^c While adhering to the opinion expressed by me there, I consider that in the present case there is ample justification for attaching due weight to the remarks made by the compiler. It is obvious that long before 1913-14 it was generally recognized in the province that daughters excluded the collaterals of their father in the matter of succession to his self-acquired property. Secondly, in spite of the fact that among Hundal Jats and various other tribes, a power to make a gift of the whole of the self-acquired property in favour of a daughter vested in the father ever since 1865, no instances were cited at the time of the compilation of this manual which supported the answer given to question 61. Thirdly, even at the time of the compilation of this manual, answer to question 113 conceded the power of gift not only on the occasion of marriage but even otherwise, and it further added that that power could be exercised without restraint even in the presence of sons or other near relations. As laid down in para. 565 of the Punjab Settlement Manual by Sir James Douie, the original compiler is required to be particularly careful to ask for precedents while recording answers and the Settlement Officer is empowered to scrutinize the answers, marking any which seem to him to be founded on a misunderstanding of the meaning of the questions or vague or probably incorrect and for this purpose he is

even required to summon the leading tribesmen in each tehsil and examine them again as to such doubtful points. It cannot be said that the compiler in this case went out of his way to throw doubt on the answers given by the representatives of the tribes. I am of opinion therefore that so far as the manual of customary law is concerned, it cannot be urged with any reasonableness on the part of the defendants that it definitely goes against the daughters or that it clearly helps the collaterals. This being the state of affairs, the evidence led in the case would have facilitated the decision of the matter in issue but unfortunately no instances have been cited by either side in support of the respective contentions raised by it. We have therefore to rely entirely on judicial decisions which, if based on instances, can now be relied upon in view of the recent pronouncement of their Lordships of the Privy Council in I. L. R. (1941) Lah. 154.¹

^j On behalf of the plaintiffs reliance is placed on 9 Lah. 352,⁸ A. I. R. 1935 Lah. 408,⁹ A. I. R. 1935 Lah. 419,³ A. I. R. 1936 Lah. 88,⁶ A. I. R. 1936 Lah. 802,¹⁰ A. I. R. 1936 Lah. 991¹¹ and 43 P. L. R. 665.¹² In 9 Lah. 352,⁸ a Division Bench composed of Broadway and Jai Lal JJ. held that in the district of Amritsar the general trend of opinion was that daughters succeeded to non-ancestral property to the exclusion of agnates. It appears that the decision in that case proceeded on the remark made in the introduction of the manual of customary law referred to above. It does not appear that any instances were cited before the learned Judges. Anyhow none were relied upon. This case therefore is not of much value to the appellants. In A. I. R. 1935 Lah. 408,⁹ the parties concerned were Khara Jats of the Amritsar district and the daughters were preferred to collaterals qua self-acquired property. There were no doubt instances relied upon in the Courts below, but Hilton J., who delivered the judgment of the Division Bench, ignored those instances and based his judgment on para. 23 of Rattigan's Digest of Customary Law, holding that inasmuch as this tribe was not consulted at the time when the manual of customary law was compiled, the customary law relating to the Amritsar District could not be invoked in the case.

^k In A. I. R. 1935 Lah. 419,³ Tek Chand and Skemp JJ. took into consideration the opinion expressed by the Settlement Officer doubting the truth of the custom and allowed the daughters of a Serai Jat to exclude his collaterals from succession to the self-acquired property. Certainly instances were expressly mentioned at p. 420 of the report, which favoured the daughter's contention. As against these instances the collaterals had mainly relied on oral evidence and it was further found that the documents relied upon by them were not to the point. Remarking that "it is instances which make up custom and the important thing about the case law is that in this Court the cases in which instances have been cited have all been decided in

3. ('35) 22 A. I. R. 1935 Lah. 419 : 158 I. C. 976 : 37 P.L.R. 229, Narain Singh v. Mt. Basant Kaur.

4. ('35) 22 A. I. R. 1935 Lah. 428, Ganga Ram v. Nihal Chand.

5. ('35) 22 A. I. R. 1935 Lah. 985 : 166 I. C. 987, Mt. Chinto v. Thebu.

6. ('36) 23 A. I. R. 1936 Lah. 88 : 162 I. C. 934, Jawala Singh v. Thakur Singh.

7. Reported in ('41) 28 A. I. R. 1941 Lah. 73 : 195 I. C. 873 : I.L.R. (1941) Lah. 872, Khadam Hussain v. Mahomed Hussain.

8. ('28) 15 A. I. R. 1928 Lah. 305 : 107 I. C. 280 : 9 Lah. 352 : 29 P. L. R. 475, Pir Bakhsh v. Mt. Ghulam Bibi.

9. ('35) 22 A. I. R. 1935 Lah. 408 : 157 I. C. 114 : 37 P.L.R. 225, Thakar Singh v. Mt. Dhan Kaur.

10. ('36) 23 A. I. R. 1936 Lah. 802 : 167 I. C. 814, Jawala Singh v. Mt. Santi.

11. ('36) 23 A. I. R. 1936 Lah. 991 : 167 I. C. 710, Ujagar Singh v. Mt. Diyal Kaur.

12. ('42) 29 A. I. R. 1942 Lah. 31 : 198 I. C. 708 : 43 P. L. R. 665, Mt. Rami v. Gian Singh.

favour of daughters" and that "in the present case there is no instance proved in favour of the collaterals," Skemp J., who wrote the judgment expressed his opinion that daughters had succeeded in establishing that among Serai Jats of the Amritsar district they excluded collaterals from succession to the self-acquired property of their father and with this judgment Tek Chand J. agreed.

In A.I.R. 1936 Lah. 88,⁶ disposed of by Jai Lal and Sale JJ. the parties were Randhewa Jats of Amritsar district and it was decided that daughters ousted collaterals beyond the fifth degree in succession to the non-ancestral property. Certain judicial instances that were relied upon by the collaterals were animadverted upon and four judicial instances that were cited on behalf of daughters were followed. In addition a number of mutations showing that daughters had succeeded in preference to the collaterals were relied upon. In A.I.R. 1936 Lah. 802¹⁰ Bhide and Currie JJ. relying on certain mutations and judicial decisions, found in favour of daughters. This case also hailed from the Amritsar district. In A. I. R. 1936 Lah. 991,¹¹ the same Bench allowed the daughter of a Kaler Jat of the Amritsar district to oust her father's collaterals from succession to the self-acquired property. Both parties had produced instances in the case and relied upon reported cases relating to other sub-divisions of Jats. It was observed that the circumstances brought on the record justified the remarks of the author of the *riwaj-i-am* in 1914 appended to the answers to questions 60 and 61 to the effect that the answers did not represent the rule of custom prevailing in the Amritsar district correctly. In 43 P.L.R. 665¹² my learned brother sitting with Bhide J. followed the recent Privy Council judgment referred to above and remarked that judicial decisions based on instances were a valuable piece of evidence in determining the custom followed by the parties concerned.

As against this, counsel for the respondents relies on A.I.R. 1925 Lah. 556,¹³ A.I.R. 1926 Lah. 142,¹⁴ 8 Lah. 281,¹⁵ A.I.R. 1928 Lah. 762,¹⁶ A. I. R. 1933 Lah. 898¹⁷ and 17 Lah. 296.¹⁸ In A.I.R. 1925 Lah. 556,¹³ the parties were Sindhu Jats of the Amritsar district and relying solely on the *riwaj-i-am* and in the absence of any instances one way or the other, a Division Bench of this Court reversed the decision of the lower appellate Court and granted the collaterals a decree declaring that the alienation of the self-acquired property of a Sindhu Jat by his widow to one of his daughters should not affect the reversionary rights of the collaterals. In A. I. R. 1926 Lah. 142,¹⁴ the parties were Kambohs and it was held that a daughter did not succeed in the presence of collaterals to her father's self-acquired property. It may be remarked that there was not a single instance on the record of a daughter having so succeeded in the presence of collaterals in the fourth degree as the respondents were, while the

respondents had cited a number of instances to support their contention. This case however is of little value to the respondents in the present case inasmuch as they are very remotely related to Sant Singh and further there have been judicial decisions since then based on instances which favour the daughters. In 8 Lah. 281,¹⁵ the parties were Hundal Jats as the present parties are. The decision proceeded mainly on the basis of the customary law and certain judicial decisions, and the daughters had not been able to adduce any instances which favoured them. It was consequently remarked that the daughters who had produced no evidence had failed to rebut the evidence supplied by the answer to Question 61 of the 1914 *riwaj-i-am* that among Jats of the Amritsar district collaterals succeeded to the self-acquired estate of a deceased proprietor in preference to his daughters.

In A. I. R. 1928 Lah. 762,¹⁶ the parties were Kambohs. My learned brother sitting in Single Bench excluded the daughters from succession to self-acquired property though situated in an urban area. Reliance was mainly placed on certain judicial decisions favouring the contentions of the collaterals, some of which related to the same tribe. In A.I.R. 1933 Lah. 898,¹⁷ Addison and Bhide JJ. in a case of the Amritsar Jats found against the daughters. It does not appear whether any instances had been cited in the case. The main discussion rested on the various manuals of customary law and the judicial decisions cited before the learned Judges. In 17 Lah. 296,¹⁸ Addison and Abdul Rashid JJ., followed 8 Lah. 281¹⁵ and decided against the daughters of an Aulakh Jat of the Amritsar district. It may be observed in connexion with this case that the remark made by the learned Judge who delivered the judgment against the existence of what was termed as general customary law, now no longer holds good in view of the decision in I. L. R. (1941) Lah. 154.¹ Certain instances had been relied upon by both sides in that case and the decision proceeded against the daughters as the instances cited against them were considered to be good. Following the principles laid down in I. L. R. (1941) Lah. 154¹ that judicial decisions based on instances are good instances in themselves and that true legal position is contained in para. 23 of Rattigan's Digest of Customary law under which collaterals are excluded by daughters in the matter of succession to self-acquired property and the initial onus is laid on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a special custom excluding the daughters, it cannot but be said that the collaterals in this case have in spite of a few decisions in their favour failed to establish that they excluded the daughters of Sant Singh from inheriting their father's self-acquired property.

Their case, however, in respect of Man Singh's property stands on a different footing. Whether Sant Singh died before Man Singh or vice versa does not alter the situation in any manner. It is conceded that in both cases widows intervened and the reversioners had no immediate right of inheriting the property. Qua Man Singh therefore the status of the present plaintiffs is that of brother's daughters and not that of daughters of Sant Singh or the grand-daughters of their grand-father. Counsel for the appellants has failed to show that there is anything contained in the *riwaj-i-am* which favours the appellants' contention that they are preferential heirs even in respect of Man Singh's estate. In the absence of custom we can only fall

13. ('25) 12 A. I. R. 1925 Lah. 556 : 85 I. C. 788, Nadhan Singh v. Mt. Rajo.

14. ('26) 13 A. I. R. 1926 Lah. 142 : 89 I. C. 724, Mt. Naraini v. Jowahir Singh.

15. ('27) 14 A.I.R. 1927 Lah. 241 : 100 I. C. 924 : 8 Lah. 281 : 29 P. L. R. 586, Labh Singh v. Mt. Mango.

16. ('28) 15 A. I. R. 1928 Lah. 762 : 112 I. C. 8, Wasakha Singh v. Mt. Gutli.

17. ('33) 20 A. I. R. 1933 Lah. 898 : 144 I. C. 483, Santa Singh v. Mt. Santi.

18. ('36) 23 A.I.R. 1936 Lah. 804 : 186 I. C. 379 : 17 Lah. 296 : 38 P. L. R. 800, Kartar Singh v. Mt. Preeto.

back on personal law but it is frankly conceded that even under Hindu law a brother's daughters are not treated as heirs at all. Counsel for the appellants urges in this connexion that this distinction was not present to the minds of the Courts below nor of the parties concerned in the case and consequently a further opportunity should be allowed to the plaintiffs to develop their case on that basis. In my view, however, it would not be possible to adopt this suggestion. Firstly, the distinction was present to the minds of the parties concerned. It was expressly stated in the plaint that the plaintiffs as nieces of their uncle Man Singh excluded collaterals. Even the trial Court has remarked that as nieces of Man Singh they could not inherit. Secondly, it would be an impossible task for the plaintiffs to find out anything favourable to them in the manuals of Customary law as there is no entry relating to nieces in those books. In the absence of any documentary evidence, all that would be available to them would be oral evidence unsupported by instances and this would not render them any valuable help.

I would accordingly allow this appeal to this extent that I would grant the plaintiffs a declaration that they were entitled to remain in possession of the property inherited by them from their father Sant Singh. Their appeal relating to Man Singh's estate would be dismissed. In the circumstances of the case I would leave the parties to bear their own costs throughout.

DALIP SINGH J. — I agree.
G.N./R.K. Order accordingly.

* A. I. R. (29) 1942 Lahore 169
FULL BENCH

TEK CHAND, DALIP SINGH AND
BLACKER JJ.

Administrator, Lahore Municipality,
Lahore — Petitioner

v.

Lala Bakhshi Ram — Respondent.

Civil Misc. Case No. 54/C of 1941, Decided on 27th April 1942; case referred by Tek Chand and Blacker JJ., D/- 30th January 1942.

* Civil P. C. (1908), Ss. 111 and 117 — S. 111 applies to all Chartered High Courts whether established before or after Code — There is no conflict between S. 111 and Cl. 29, Lahore Letters Patent — Appellate decree or order of Single Bench of Lahore High Court is not appealable to His Majesty-in-Council.

Clause 29 of the Lahore Letters Patent permits appeals to His Majesty in Council from (1) any final judgment, decree or order of the High Court made on appeal, and (2) any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the High Court, or of any Division Court. In either of these cases, however, the condition must be satisfied that from such judgment, decree or order "an appeal does not lie under the provisions contained in Cl. 10 of the Lahore Letters Patent. A decree or order passed by a single Bench of the Lahore High Court on second appeal from the appellate decree of a subordinate Court is, under Cl. 10 of the Lahore Letters Patent, appealable to a Bench of two or more Judges of the High Court and therefore the condition is not satisfied and consequently no appeal lies to His Majesty-in-Council from such a decree or order. There is thus

no conflict between S. 111 of the Code and Cl. 23 of the Lahore Letters Patent. [P 170 C 1]

In view of the provision of S. 117, S. 111, Civil P. C., applies to all Chartered High Courts whether established before or after the passing of the Code: (24) 11 A.I.R. 1924 Mad. 399; (31) 18 A.I.R. 1931 Bom. 503 and (36) 23 A.I.R. 1936 Pat. 108, Rel. on. [P 170 C 2]

Hence no appeal lies to His Majesty-in-Council either under S. 111, Civil P. C., or under Cl. 29, Lahore Letters Patent, from a decree or order passed by a Single Bench of the Lahore High Court on second appeal. [P 170 C 2]

Dr. Shuja-ud-Din and Karamat Ali — for Petnr.
M. C. Mahajan — for Respondent.

TEK CHAND J. — This is a petition for leave to appeal to His Majesty-in-Council from the judgment of Din Mohammad J., dated 29th April 1941, whereby he dismissed Regular Second Appeal No. 1284 of 1940 which had been preferred by the petitioner from the appellate decree of the Senior Subordinate Judge, Lahore, modifying that of the Court of first instance and decreeing the plaintiff's suit in part. At the hearing of the petition before the learned Judge, it was objected on behalf of the respondent that the petition was incompetent in view of the express provisions of S. 111, Civil P. C. In reply to this preliminary objection, it was contended on behalf of the petitioner that, so far as the Lahore High Court was concerned, S. 111, Civil P. C., had been superseded by Cl. 29, Letters Patent, under which an appeal lies to His Majesty-in-Council from any final judgment, decree or order of the High Court of Judicature at Lahore, provided the conditions specified in that clause relating to valuation etc., are satisfied. As the question had never been raised in this form before and was of general importance, the learned Judge referred the case to a Division Bench which, in turn, has referred it to the Full Bench. We have heard Dr. Shuja-ud-Din for the petitioner at length but find no substance in his contention. Section 111 of the Code is clear and explicit in its terms and lays down that:

"Notwithstanding anything contained in S. 109, no appeal shall lie to His Majesty-in-Council from the decree or order of one Judge of a High Court constituted by His Majesty by Letters Patent."

This section corresponds to S. 597 of the Code of 1882, which reproduced, with certain immaterial alterations, S. 6, Privy Council Appeals Act, 6 of 1874, when this provision was first introduced. The reason for prohibiting such appeals evidently was that under the Charters of the High Courts, which had been established under the Indian High Courts Act, 1861, an appeal from the judgment of a Single Judge was allowed to a Bench of two or more Judges of the same Court and it was considered desirable that the aggrieved party should exhaust his remedies in India before appealing to His Majesty-in-Council. This being the underlying object, S. 111 (like the corresponding sections in the earlier Acts) was made applicable only to High Courts established by Royal Charter; it did not apply to Courts not so established, e.g., the Chief Court of the Punjab or the Judicial Commissioner, N. W. F. Province. Consequently, a final order or decree of a Single Judge of the Punjab Chief Court was held appealable to His Majesty-in-Council (104 P. R. 1917).

1. (17) 4 A. I. R. 1917 P. C. 156 : 42 I. C. 43 : 45 Cal. 94 : 44 I. A. 218 : 104 P. R. 1917 (P. C.), Brij Indar Singh v. Lala Kashi Ram.

More than ten years after the Code of 1908 came into force, the Punjab Chief Court was abolished and the Lahore High Court established by Letters Patent granted on 21st March 1919 by His Majesty under the powers vested in him by S. 113, Government of India Act 1915, and Cl. 29, Letters Patent, made provision for appeals to His Majesty-in-Council from judgments, decrees or orders passed by this Court. It is contended on behalf of the petitioner that this clause allows an appeal from any decree or final order of the High Court, whether passed by one Judge or a Bench of two or more Judges, and that this being a later provision superseded S. 111 of the Code which would otherwise have been applicable. This contention is clearly based on a misreading of Cl. 29, Letters Patent. That clause is as follows :

"And we do further ordain that any person or persons may appeal to us, our heirs and successors in our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Lahore made on appeal and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in Cl. 10 of these presents; provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rs. 10,000, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than ten thousand rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to us, our heirs or successors, in our or their Privy Council but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to ourselves in Council from the Courts of the Provinces of the Punjab and Delhi, except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as we may, with the advice of our Privy Council, hereafter make in that behalf."

It will be seen that the clause permits appeals to His Majesty-in-Council from, (1) any final judgment, decree or order of the High Court made on appeal, and (2) any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the High Court, or of any Division Court of the Court. In either of these cases, however, the condition must be satisfied that from such judgment, decree or order "an appeal does not lie under the provisions contained in Cl. 10, Letters Patent." The words, which I have underlined (here italicized), appear to be qualificatory of the preceding clauses relating to the judgments, decrees or orders passed by the High Court "in appeal" as well as those mentioned in (2) above. A decree or order passed by a Single Bench of this Court on second appeal from the appellate decree of a Subordinate Court is, under Cl. 10, Letters Patent, appealable to a Bench of two or more Judges of the High Court and therefore the condition is not satisfied and consequently no appeal lies to His Majesty-in-Council from such a decree or order. There is thus no conflict between S. 111 of the Code and Cl. 29, Letters Patent, and the very foundation of the argument of the petitioner's learned counsel disappears.

Equally devoid of force is his second contention that S. 111, Civil P. C., applies only to the Chartered High Courts which had been established before the passing of the Code and not to those which have been established after 1908. This contention overlooks S. 117 of the Code, which appears in Part IX, headed "Special provisions relating to the Chartered High Courts." The first section in this part is S. 116 which says "this part applies only to High Courts which are or may hereafter be established under the High Courts Act, 1861, or the Government of India Act, 1915." This is followed by S. 117 which enacts that "save as provided in this part or in part X or in rules, the provisions of this Code shall apply to such High Courts," i.e., to all Chartered High Courts whether established before or after the passing of the Code. In this connexion reference may be made to 46 Mad. 953² and 134 I. C. 1164³ and see also 56 Cal. 512⁴ at p. 519. A case very similar to the present is 160 I. C. 150,⁵ decided by the Patna High Court which, like the Lahore High Court, was established after 1908. In that case also, S. 111 was held to bar a petition to leave to His Majesty-in-Council from the appellate decree of a Single Bench of that Court.

Before concluding it may be mentioned that Dr. Shuja-ud-Din abandoned before us the further argument raised by him before the Single Bench, based on the last part of Cl. 29, Letters Patent, which states that this clause is subject to such rules and orders as are now in force respecting appeals to Privy Council except so far as the existing 'rules and orders' are hereby varied. The reference to 'rules and orders' is to the rules and orders made by His Majesty-in-Council for appeals to His Privy Council. Admittedly, no such rule has been framed which affects the applicability of S. 111 of the Code. My answer to the reference therefore is that no appeal lies to His Majesty-in-Council, either under the Civil Procedure Code or the Letters Patent from the decree of the learned Judge in Single Bench, dismissing the petitioner's second appeal, and the petition for leave to prefer such appeal is incompetent. The case will be returned to the Single Bench for orders.

DALIP SINGH J. — I agree.

BLACKER J. — I agree.

G.N./R.K.

Answer accordingly.

2. ('24) 11 A. I. R. 1924 Mad. 399 : 75 I. C. 604 : 46 Mad. 958 : 46 M. L. J. 117, Satyanarayana Varaprasada v. Venkata Bhashyakarla.

3. ('31) 18 A.I.R. 1931 Bom. 503 : 134 I. C. 1164 : 33 Bom. L. R. 1106, Hanmant v. Shrinivas.

4. ('28) 15 A.I.R. 1928 Cal. 640 : 113 I. C. 49 : 56 Cal. 512 : 48 C.L.J. 150 : 32 C.W.N. 1130 (F.B.), Sardar Ali v. Dolluddin Ostagar.

5. ('36) 23 A.I.R. 1936 Pat. 106 : 160 I. C. 150: 17 P. L. T. 173, Parmeshwar Dayal v. Brindaban Chandra.

C. P. C. —

('40) Chitaley, S. 111 N. 3; S. 117 N. 1.

('41) Mulla, Page 405 Note "Appeal from a decree of a Single Judge."

*** A. I. R. (29) 1942 Lahore 171**

FULL BENCH

YOUNG C. J., BHIDE AND
MUHAMMAD MUNIR JJ.

P. T. Chandra, Editor Tribune
Petitioner

v.

Emperor.

Criminal Revn. Petn. No. 403 of 1942, Decided on 26th February 1942, for revision of order of Dist. Magistrate, Lahore, D/- 23rd February 1942.

* (a) Criminal P. C. (1898), Ss. 144, 435 and 439—Order under S. 144—High Court has power to interfere in revision.

The opinion of a District Magistrate, expressed under S. 144, although entitled to great weight, is not absolute and cannot interfere with the right of the High Court under the revisional sections of the Criminal Procedure Code to interfere with the order or set it aside. In proper cases the High Court has full power to interfere with such orders: ('31) 18 A.I.R. 1931 P.C. 111, *Disting.* [P 171 C 2; P 172 C 1]

The propriety of the order as well as its legality can be considered by the High Court in revision, though in examining the propriety of the order the High Court will undoubtedly give due weight to the opinion of the District Magistrate who is the man on the spot and responsible for the maintenance of public peace in his district. [P 172 C 2]

(b) Criminal P. C. (1898), S. 144—Order under —Conditions for, stated.

To justify an order under S. 144 there must be a causal connexion between the act prohibited and the danger apprehended to prevent which the order is passed. [P 172 C 1]

(c) Criminal P. C. (1898), S. 144—Order under, interfering with liberty of press—When should be passed, explained.

The right of the public to have news published is common to all countries where there is liberty of the press and it is the right of all newspapers equally to publish news provided it does not offend against any existing law. It is obvious therefore that the powers given to a Magistrate under S. 144, Criminal P. C., to interfere with the liberty of the press should be used very sparingly and only for good cause shown. It is for this reason that S. 144 itself makes it obligatory for the Magistrate in any such order to indicate the material facts which justify such an order. Not only is it necessary to state the material facts but there must be urgency in the matter: ('40) 27 A.I.R. 1940 Bom. 42; ('19) 6 A.I.R. 1919 Cal. 584; ('31) 18 A. I. R. 1931 Mad. 236 and ('24) 11 A.I.R. 1924 Pat. 767, *Rel. on.* [P 172 C 1, 2]

(d) Criminal P. C. (1898), S. 144 — District Magistrate acting as such suo motu is criminal Court.

Where a District Magistrate acts as District Magistrate, he is a criminal Court. There is no distinction between an order passed by him after evidence has been taken and an order passed suo motu after considering the material which is within his knowledge. [P 172 C 2]

(e) Criminal P. C. (1898), S. 439 — For interference under S. 439, District Magistrate need not have acted as Court (Per Bhide J.)

It does not seem necessary for the purposes of S. 439 that the District Magistrate should be acting

as a Court. The wording of that section is very wide and covers any proceedings the record of which had been called for by the High Court or which has been reported for orders or which otherwise comes to its knowledge. [P 172 C 2]

M. C. Mahajan, J. L. Kapur, Harians Singh, Indar Dev, Faqir Chand Mittal and Yashpal Gandhi — for Petitioner.

M. Saeem, Advocate-General and Basant Krishan, Asst. Advocate-General—for the Crown.

YOUNG C. J. — The "Tribune" newspaper has filed a petition under Ss. 435 and 439, Criminal P. C., praying this Court to set aside an order passed by the District Magistrate, Lahore, under Sec. 144 of that Code, prohibiting any publication of any article concerning the hartal against the Sales Tax, or concerning police action taken against processionists or persons otherwise assisting or taking part in the hartal, in any newspaper or pamphlet published within Lahore District, unless such article has been previously shown to the District Magistrate and has his approval. This order was subsequently amended to require the approval not of the District Magistrate but of the Officer-in-charge of the Press Branch of the Punjab Government.

Mr. Mehr Chand Mahajan on behalf of the "Tribune" has given us a long history of the trouble which has arisen out of the Sales Tax Act, but it is unnecessary for us for the purposes of this order to deal with this history. It is contended by the Advocate-General that, except where an order under S. 144 is made without jurisdiction, this Court has no jurisdiction to revise it under S. 439. The argument, which is confined to the interpretation of the words "in the opinion of a District Magistrate" occurring in S. 144 (1), being that where in an emergency a District Magistrate forms an opinion, an interference with the order on the facts would amount to a substitution of the opinion of this Court for that of the District Magistrate, and that the High Court would then be exercising the power given by the Statute to the District Magistrate. In support of this contention he relies on the case in A.I.R. 1931 P. C. 111,¹ a well-known decision which dealt with the power of the Governor-General of India to set up by ordinance a Special Tribunal to try certain offenders. The Privy Council in that case held that the Governor-General was the sole Judge of the emergency and that no Court had power to revise or alter his decision on the matter. This authority is hardly a guide to us in this case. There is no statute giving power to anyone to revise the ordinances of the Governor-General. On the other hand, S. 435, Criminal P. C., specifically gives to the High Court the power to examine the correctness, legality or propriety of any finding, sentence or order recorded or passed by any inferior criminal Court or the regularity of any proceedings of such Court. Before 1923 there could be some doubt about the power of the High Courts to revise orders under S. 144 but sub-s. (3) of S. 435, Criminal P. C., which created that doubt, was deleted from that section by Sec. 116, Criminal P. C. Amendment Act, 18 of 1923, and since that amendment all the High Courts are agreed that in proper cases the High Court has full power to interfere with such orders.

Brett L. J.'s observations in (1882) 8 Q.B.D. 664²

1. ('31) 18 A.I.R. 1931 P.C. 111; 181 L.C. 415; 12 Lah. 280; 32 Cr.L.J. 727; 58 I.A. 169 (P.C.), Bhagat Singh v. Emperor.

2. (1882) 8 Q.B.D. 664; 51 L.J.Q.B. 348; 46 L.T. 669; 30 W.R. 805, Ormerod v. Todmorden Mill Co.

at page 678 answer the point raised by the learned Advocate-General. The learned Lord Justice was dealing with the interpretation of Sec. 57, English Judicature Act of 1873. It was contended that the Court of appeal had no power to review the order made by a Judge under this section. This section of the Judicature Act deals with the power of a Judge to send certain cases to be tried by an official referee instead of by the ordinary Court. The words which are material to the argument in this case are "cannot, in the opinion of the Court or a Judge conveniently be made before a jury." The learned Lord Justice observed :

"It is said that if the Judge has that opinion then we cannot say that it appears he has not that opinion, and therefore from the nature of the thing there is no appeal. I cannot give that force to the phrase I have just referred to. The words 'in the opinion of the Court or a Judge' seem to me to be equivalent to according to the judgment of the Court or a Judge."

He therefore held that an appeal did lie against an order made under this section and that the appellate Court could set aside the order based upon the opinion of a Judge in the lower Court. It appears to us, therefore, that the opinion of a District Magistrate, expressed under S. 144, Criminal Procedure Code, although entitled to great weight, is not absolute and cannot interfere with the right of this Court under the revisional sections of the Criminal Procedure Code to interfere with the order or set it aside. With the exception in A. I. R. 1931 P. C. 111,¹ which, as I have pointed out is entirely distinguishable, the learned Advocate-General has not cited any authority in support of the very wide proposition which he invites us to accept, whereas on the contrary, the right of the High Court to interfere with such orders has been recognised by all the High Courts in this country.

Concerning the merits of the order : In the first place, the order in this case does not comply with the provisions of the section itself. Section 144 enacts that the Magistrate may, "by a written order stating the material facts of the case . . . direct any person to abstain from a certain act." In this order no material facts, which would justify the order, have been given. To justify an order under S. 144 there must be a causal connexion between the act prohibited and the danger apprehended to prevent which the order is passed. It is not stated in the order, nor is it alleged, that the publication of news about the hartal had let in the past to the formation of unlawful processions. Nor has any connexion been shown between the articles to be published in the press and the alleged danger of disturbance of public tranquillity. As held in A.I.R. 1940 Bom. 42,² the right of the public to have news published is common to all countries where there is liberty of the press and it is the right of all newspapers equally to publish news provided it does not offend against any existing law. It is obvious therefore that the powers given to a Magistrate under S. 144, Criminal P. C., to interfere with the liberty of the press should be used very sparingly and only for good cause shown. It is for this reason that S. 144 itself makes it obligatory for the Magistrate in any such order to indicate the material facts which justify such an order. There are many authorities which make it clear that not only is it

necessary to state the material facts but that there must be urgency in the matter; see for instance 23 C. W. N. 145;³ A. I. R. 1931 Mad. 286⁵ and A. I. R. 1924 Pat. 767.⁶ It has also been held that the propriety of the order as well as its legality can be considered by the High Court in revision, though in examining the propriety of the order the High Court will undoubtedly give due weight to the opinion of the District Magistrate who is the man on the spot and responsible for the maintenance of public peace in his district.

It has been argued by the learned Advocate-General that the District Magistrate acting under S. 144 is not a Criminal Court. But in this case the District Magistrate undoubtedly has acted as a District Magistrate, and as such he is a criminal Court. There are many cases under S. 144 where considered orders are made by the District Magistrate after evidence has been adduced by the parties. I see no distinction between an order passed after evidence has been taken and an order passed, as in this case, suo motu after considering the material which is within his knowledge. I, therefore, must come to the conclusion that this order ought to be set aside. It is open, however, to the District Magistrate if in future he arrives at an opinion on the materials before him that public tranquillity would be disturbed by the publication of news concerning the hartal or police action in connexion therewith, to state properly that material and pass an order under this section according to law.

MUHAMMAD MUNIR J. — I agree.

BHIDE J. — I agree. As regards the contention that the District Magistrate, acting under S. 144, Criminal P. C., is not a 'Court' and hence his proceedings are not subject to revision, it may be pointed out that it has been held by their Lordships of the Privy Council in 39 Cal. 953⁷ at p. 966 that for the sake of brevity, the Code uses the terms 'Court' and 'Magistrate' generally, if not always, as convertible terms. In that case, a District Magistrate before whom no enquiry was pending at the time, had issued a search warrant for search of certain premises under S. 96, Criminal P. C. It was held that the District Magistrate was a 'Court' within the meaning of that section. The present case is even stronger. It will be noticed that Chap. 3, Criminal P. C., is headed "powers of Courts" and S. 36 (read with Sch. 3) which defines the powers of District Magistrates including the power to issue orders under S. 144 is in that chapter. Besides, it does not seem necessary for the purposes of S. 439, Criminal P. C., that the District Magistrate should be acting as a 'Court.' The wording of that section is very wide and covers 'any proceedings' the record of which had been called for by the High Court or which has been reported for orders, or which otherwise comes to its knowledge. The amendment of this section in 1923, has, I think, placed the power

3. (40) 27 A.I.R. 1940 Bom. 42; 196 I. C. 477; 41 Bom. L. R. 1258; 41 Cr. L. J. 319, In re Anandhar Pithorshaw.

4. (19) 6 A. I. R. 1919 Cal. 584; 47 I. C. 803; 19 Cr. L. J. 951; 28 C. L. J. 483; 28 C. W. N. 145, Chandra Nath v. East Indian Railway.

5. (31) 18 A. I. R. 1931 Mad. 236; 131 I. C. 449; 32 Cr. L. J. 744; 60 M. L. J. 378, Satyanarayana Chaudhari v. Emperor.

6. (24) 11 A. I. R. 1924 Pat. 767; 82 I. C. 42; 25 Cr. L. J. 1179; 6 P. L. T. 130, R. E. Blong v. Emperor.

7. (12) 39 Cal. 953; 16 I. C. 501; 39 I. A. 163; 16 C. L. J. 251; 16 C. W. N. 865 (P. C.), Clark v. Brojendra Kishore Roy.

a of the High Court to revise orders under S. 144, Criminal P. C., beyond any doubt.

K.S./R.K.

Order set aside.

Cr. P. C. —

(a) ('41) Chitaley, S. 144 N. 15 Pts. 4, 5, 6; Sec. 435 N. 11 Pt. 9.

('41) Mitra, Pages 356, 357 N 352.

(b) ('41) Chitaley, S. 144 N. 6 (vi).

('41) Mitra, Page 333 N. 366.

(c) ('41) Chitaley, S. 144 N. 6 Pt. 31b.

('41) Mitra, Page 332 N. 366.

(d) ('41) Chitaley, S. 144 N. 12 Pt. 3a.

('41) Mitra, Page 333 N. 367.

(e) ('41) Chitaley, S. 435 N. 7 Pt. 1.

('41) Mitra, Page 1882 Note "Criminal Court."

b * A. I. R. (29) 1942 Lahore 173
FULL BENCH
TEK CHAND, DALIP SINGH AND
BECKETT JJ.

Sri Ram — Appellant

v.

Collector, Lahore — Respondent.

First Appeal No. 190 of 1941, Decided on 20th April 1942; case referred by Dalip Singh and Sale JJ., D/- 11th February 1942.

(a) Hindu law — Joint family — Essential features as regards outsiders and as between coparceners indicated — Interest of member on his death passes by survivorship to other coparceners—Member cannot devise his interest — There is no question of succession to it — In no part of coparcenary property he leaves estate of his own in respect of which letters of administration could be granted,

The essential features of a joint Hindu family, governed by the Mitakshara are unity of ownership of joint property and unity of juristic existence in dealing with third parties. The family is a sort of corporation having a continued existence. Its constitution might change by birth, adoption, marriage or death, but as regards strangers it is deemed to be a single individual, a separate legal entity. While this is so as regards outsiders, as between the coparceners there is complete community of ownership and unity of possession. No individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. He has an interest in the coparcenary and on his death this interest lapses to the coparcenary. It passes by survivorship to the other coparceners. He, therefore, has no power to devise it by will nor is there any question of succession to it. In no part of the coparcenary property has he left an estate of his own, in respect of which letters of administration could be granted : 11 M.I.A. 75 (P.C.), *Rel. on.* [P 174 C 2; P 175 C 1]

(b) Succession Act (1925), Ss. 278 and 256 — Joint Hindu family—Shares in bank purchased with funds of family and belonging to it standing in name of karta — Legal title is in karta while beneficial interest vests in all coparceners—On death of karta, application for letters of administration limited to shares in question is competent.

Where shares in a bank (Imperial Bank of India and Reserve Bank of India) purchased with the funds of the joint Hindu family and belonging to

it stand in the sole name of the karta the legal title is in the karta while the beneficial interest vests in all the coparceners. On the death of the karta, no change takes place so far as the beneficial interest is concerned. It continues to be as it has always been in the family. The legal estate, however, does not pass by survivorship to the other coparceners and consequently an application for grant of letters of administration by the surviving coparceners limited to the shares in question is competent even though the beneficial interest had, on the death of the karta, vested jointly in the other coparceners and his widow under Hindu Women's Rights to Property Act (18 of 1937, as amended by Act 11 of 1938): 24 Bom. 350 and ('29) 16 A. I. R. 1929 Rang. 99, *Rel. on.*

[P 175 C 1, 2]

* (c) Court-fees Act (1870), Ss. 19D, 19 (viii), 19 and 19K—Effect—Shares in bank purchased with joint Hindu family funds standing in name of one member (deceased)—No court-fee is payable on letters of administration in respect of such shares.

Sections 19D, 19 (viii), 19 and 19K make it clear that ad valorem duty is not payable on probate of a will or letters of administration relating to property held by a deceased person wholly or partially in trust, but that the exemption does not extend to property held in trust beneficially or with general power to confer a beneficial interest. The shares in a bank purchased with joint Hindu family funds but standing in the name of one of its members (deceased) is property held in trust by that member for the joint family and hence no court-fee is payable on letters of administration limited to such shares : ('24) 11 A.I.R. 1924 Bom. 228 (F. B.) and 23 Cal. 980, *Rel. on ; Case law discussed.*

[P 176 C 2 ; P 178 C 1]

(d) Hindu law—Joint family—In Madras and Bombay coparcener can sell, mortgage or otherwise alienate for value his undivided interest without consent of other coparceners — This limited power does not alter character of property.

No doubt according to the Mitakshara law as prevailing in Madras and Bombay Presidencies, a coparcener may sell, mortgage or otherwise alienate for value his undivided interest in coparcenary property, without the consent of the other coparceners. But this limited power cannot alter the character of the property or make any difference in the character of the deceased's title to, or possession of, the property at the time of his death: ('24) 11 A. I. R. 1924 Bom. 228 (F. B.), *Rel. on ;* 33 Mad. 93 (F. B.), *Not approved.* [P 177 C 2]

(e) Hindu law — Joint family—Punjab—Coparcener's power to alienate his undivided interest.

In a Mitakshara joint family in the Punjab no coparcener can alienate even for value his undivided interest without the consent of his other coparceners, unless he is the karta of the family and the alienation has been made for legal necessity.

[P 177 C 2]

(f) Hindu law—Partition—Punjab—Son cannot enforce partition in father's lifetime.

In the Punjab the right to have the joint property partitioned is much more restricted, for instance, a son cannot enforce partition in the lifetime of the father: ('18) 5 A. I. R. 1918 Lah. 291 (F.B.), *Rel. on.* [P 177 C 2]

(g) Court-fees Act (1870), S. 19-D—Applicability.

The applicability of S. 19-D is not conditional on the circumstance that there had been a previous grant of a probate or letters of administration: 29 Bom. 161, *Rel. on*; ('35) 22 A. I. R. 1935 All. 449, *Not approved*. [P 178 C 1]

(h) Hindu law—Joint family — Karta—Position of, is not essentially different from managing partner or agent (*Per Beckett J.*).

When the property owned by a joint family in its own name is in the charge of a karta the position of the karta cannot be said to be essentially different from that of a managing partner or an agent either of whom may be regarded as occupying a position of trust for certain purposes and so become subject to many of the obligations of a trustee in respect of the property under his charge. This does not however mean that the joint property can be treated as trust property in the sense mentioned above, any more than property held by a man in his own name becomes trust property merely because it has to be entrusted to an agent for management. The position, however, would be quite different if the managing agent became legal owner of the property in his own name, although the intention was that the beneficiary interest should belong to the firm with which he was connected. [P 178 C 2]

(i) Hindu law — Joint family—Property purchased by karta out of family funds—Presumption (*Per Beckett J.*).

When property is purchased by the karta of a joint Hindu family out of the family funds, the presumption must be that the intention is to hold the property for the benefit of the family. [P 179 C 1]

(j) Succession Act (1925), Ss. 278 and 256—Property purchased out of joint family funds standing in name of one of its members—Death of member—Form of application for letters of administration in respect of that property stated (*Per Beckett J.*).

On the death of a member of a joint Hindu family in whose name alone property purchased out of joint family funds is standing an application for letters of administration would make the position much clearer if it began by setting out that the deceased was a member of a joint Hindu family, who had in consequence died possessed of no personal estate of his own except that shown in Annexure A of the prescribed form, under Sch. 3, Court-fees Act, and that the whole or most of this property was merely held in trust for the benefit of the whole family for which exemption was accordingly being claimed as shown in Annexure B under Sch. 3, Court-fees Act. It would then be a mere question of fact whether the property was in fact trust property or not—a question to be decided in accordance with the ordinary presumptions. [P 179 C 1]

M. C. Mahajan and Yashpal Gandhi —
for Appellant.

Basant Krishan Khanna, Assistant Advocate-
General — for Respondent.

TEK CHAND J. — The facts of the case which has given rise to this reference to the Full Bench are as follows : Lala Balak Ram of Lahore was the karta of a joint Hindu family governed by the Mitakshara. In his lifetime he had purchased, with the funds of the joint family, certain shares in the Imperial Bank of India and the Reserve Bank of

India, but the purchases were made in his name alone. The shares, though owned by the joint Hindu family, stood in Lala Balak Ram's name till his death, which occurred on 7th July 1940. On his death Sri Ram, as the eldest male member of the family, became the karta and shortly afterwards he wrote to the Banks to transfer the shares in his name. The Banks declined to do so, unless letters of administration or a succession certificate granted by a competent Court were produced. In support of the position taken up by them, the Imperial Bank relied upon Sch. 2, Regn. 11, Imperial Bank of India Act 47 of 1920, as amended by Act 8 of 1934, and the Reserve Bank on S. 56 (5), Reserve Bank of India Act 2 of 1934.

Sri Ram, accordingly, presented in the Court of the Senior Sub-Judge, Lahore, a petition, purporting to be under S. 278/256, Succession Act, 39 of 1925, for grant of letters of administration in respect of the shares above-mentioned. Citations were issued to the next-of-kin of the deceased and notice was also sent to the Collector. No caveat was entered by any one against the grant of the letters of administration. The Collector, however, urged that ad valorem court-fee was payable on the letters of administration, calculated on the value of the shares in question at the rate prescribed in Art. 11 of Sch. 1, Court-fees Act. The petitioner maintained that the shares belonged to the joint Hindu family and not to the deceased personally and were held by him in trust for the family and, therefore, no court-fee was payable under S. 19-D of the Act. The Senior Sub-Judge did not accept this contention. He agreed with the Collector and ordered the letters of administration to issue to the petitioner on payment of ad valorem court-fees. From this order the petitioner has presented this appeal in which the sole question raised is that, in the circumstances, no court-fee was payable on the letters of administration. The appeal came up for hearing before a Division Bench who, in view of the conflict of decisions of the various High Courts and having regard to the general importance of the question involved, have referred the case to a Full Bench.

Before considering the question of court-fee, it is necessary to notice a point which, though not directly raised in the Court below, was mentioned in its judgment and also in the referring order, viz., whether in view of the admitted fact that the deceased was a member of a joint Hindu family with the petitioner and others, letters of administration could at all be granted to the petitioner or any other person in respect of any part of the property held by him in coparcenary with his sons. The essential features of a joint Hindu family, governed by the Mitakshara, are (1) unity of ownership of joint property and (2) unity of juristic existence in dealing with third parties. The family is a sort of corporation having a continued existence. Its constitution might change by birth, adoption, marriage or death, but as regards strangers it is deemed to be a single individual, a separate legal entity. While this is so as regards outsiders, as between the coparceners there is complete community of ownership and unity of possession. In the classical words of Lord Westbury in the well-known case in 11 M. I. A. 751 :

"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate

1. ('66-67) 11 M. I. A. 75 : 8 W. R. 1 : 2 Sar. 218 :
1 Sather 657 (P.C.), *Appovier v. Rama Subba Aiyar*.

of the joint and undivided property, that he, that particular member, has a certain definite share."

He has an interest in the coparcenary and on his death this interest lapses to the coparcenary; it passes by survivorship to the other coparceners. He, therefore, has no power to devise it by will, nor is there any question of succession to it. In no part of the coparcenary property has he left an 'estate' of his own, in respect of which letters of administration could be granted. This is the general rule. But the position is different where property purchased with the funds of the joint family and belonging to it, stands in the name of the karta or another member of the family in his individual name, so that while the legal estate vests in him, the beneficial interest is in the family. On the death of such person no change takes place so far as the beneficial interest is concerned. It continues to be, as it has always been, in the family. The legal estate, however, does not pass by survivorship to the other coparceners and, therefore, letters of administration may be granted to the surviving coparceners as his 'heirs' to the legal estate in such property and limited to it alone. (Mulla's Hindu Law, 9th Edn. page 44). The leading case on the subject is 24 Bom. 350² the facts of which were very similar to those of the case before us. There, a joint Hindu family consisting of the father and son owned certain shares in the Bank of Bombay, which had been purchased in the sole name of the father and stood in his name till his death. After his death, the son applied to the bank to have the shares transferred in his name but the bank refused contending that they were not bound to do so without the production of the probate of the will of the deceased (if any) or letters of administration to his estate. The contention was upheld by the High Court, it being held that, having regard to the terms of the Presidency Banks Act (9 of 1876) a share in the bank, for the purpose of devolution or survivorship, must be deemed, so far as the bank was concerned, the exclusive property of the registered holder and, therefore, the surviving coparcener could not demand that the bank should, by reason of his survivorship under Hindu law, register him as a shareholder in respect of the shares which stood in the sole name of the deceased. Jenkins C. J., who delivered the judgment of the appellate Bench, after referring to the relevant provisions of the Presidency Banks Act observed that the effect of these provisions is that :

"A share, as between the bank and all who may be interested in it, is the exclusive and separate property of the registered shareholder. This result, it should be noted, arises not out of mere contractual obligation, but out of a provision of Legislative force capable of moulding the rights of individuals in a form not possible by mere contract."

The Legislature has, in my opinion, only given effect to what the conduct of the business requires when it provided that the bank had only to do with the legal title to the share, and that a share was for the purpose of devolution or survivorship, to be deemed, so far as the bank was concerned, the exclusive property of its registered holder or holders. But if for the purposes of the Act the share was the exclusive property of the deceased holder, on his death the legal title did not survive; but it devolved on his legal representative, so that S. 23 of the Act applies. That section provides that the

bank shall not be bound to recognise any legal representative other than a person who has taken out from a Court having jurisdiction in this behalf probate of the will or letters of administration to the deceased. It has, however, been argued that in view of the provisions of S. 4, Probate and Administration Act, S. 23, Presidency Banks Act, cannot be treated as applicable.

It is said that inasmuch as the beneficial interest in the share passed by survivorship, the share would not, according to the words of the section, vest in the executor or administrator. But this argument is founded on an obvious fallacy; it confuses the legal title and the beneficial interest, and assumes that because the beneficial interest has survived, the legal title must follow suit. But as I have pointed out, it is with the legal title alone that we are concerned, and that has not survived."

Similarly, in 7 Rang. 39³ it was held that while it was not possible to grant general letters of administration in respect of the entire estate of the deceased, a limited grant could be made, where a deceased member of a joint Hindu family had the legal title (in certain property) which remained in existence after his death and vested in his legal representative, whilst the beneficial interest passed to the other coparceners by survivorship. In the present case the position is exactly the same. Regulation 11 in Sch. 2, Imperial Bank of India Act, lays down :

"The executors or administrators of a deceased sole holder of a share, the holder of a succession certificate issued under Part 10, Succession Act, 1925, in respect of the share, and a person in whose favour a valid instrument of transfer of the share was executed by the deceased holder during his lifetime, shall be the only persons who may be recognized by the bank as having any title to the share."

Section 56 (5), Reserve Bank of India Act, provides that a declaration as to ownership made by a registered shareholder in respect of shares standing in his name shall not "operate to affect the bank with notice of any trust, and no notice of any trust express, implied or constructive, shall be entered on the register or be receivable by the bank."

In view of these statutory provisions, the position as stated already is the same as in the Bombay case referred to above. The shares in question were purchased with the funds of the joint Hindu family and have all along belonged to it. But the purchases having been made in the sole name of Lala Balak Ram, the legal title was therefore in him, while the beneficial interest vested in all the coparceners. In such circumstances, an application for grant of letters of administration, limited to the shares in question, was competent even though the beneficial interest had, on the death of Lala Balak Ram, vested jointly in the other coparceners and his widow under Act 18 of 1937 as amended by Act 11 of 1938. It may be mentioned that the petition presented by the petitioner was very inartistically drawn and several inaccurate expressions were used in it. But the correct facts were set out in detail in the petition, and the position was made clear in the statement of counsel at the commencement of the proceedings, and the trial proceeded on this assumption. As stated already, no objection was taken by any one to the grant of letters of administration, limited to the shares, and the only point in contro-

3. ('99) 16 A.I.R. 1929 Rang. 99 : 115 I. C. 905 : 7 Rang. 89, Gopalaswami Pillai v. Meenakshi Ammal.

2. (1900) 24 Bom. 350 : 2 Bom.L.R. 467, Bank of Bombay v. Ambalal Sarabhai.

versy in the trial Court, as well as in appeal, relates to the amount of court-fee payable.

This question has been the subject of much controversy and conflict in various Courts and three divergent views have been taken : (1) The Calcutta High Court has held, and this is the latest view of the Bombay High Court also, that in circumstances similar to those arising in this case no court-fee is payable, the property being held by the deceased as a trustee and the case being governed by S. 19D: 23 Cal. 980⁴ and 48 Bom. 75.⁵ (2) The Madras High Court is of the view that court-fee is payable on the value of the "share" of the deceased in the property in question and not on the value of the entire property: 32 Mad. 93.⁶ (3) The Allahabad and Patna High Courts, on the other hand, have held that ad valorem duty is payable on the value of the entire property: 57 All. 881⁷ and 17 Pat. 542.⁸ There is no ruling of the Lahore High Court directly dealing with this matter. Before considering the reasons in support of these divergent views it will be convenient to refer to the relevant provisions of the Court-fees Act. Section 19 (viii) of the Act provides that no duty will be payable on the probate of a will or letters of administration where the amount or value of the property in respect of which the probate or letters of administration shall be granted does not exceed Rs. 1000. Article 11 of Sch. I prescribes the duty payable on probate of a will or letters of administration with or without the will annexed when the amount or value of the property exceeds Rs. 1000. Section 19D, which was added by Act 13 of 1875, lays down :

"The probate of the will or the letters of administration of the effects of any person deceased, heretofore or hereafter granted, shall be deemed valid and available by his executors or administrators for recovering, transferring or assigning any moveable or immovable property whereof or whereto the deceased was possessed or entitled, either wholly or partially as a trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate in respect of which a court-fee was paid on such probate or letters of administration."

Section 19-I requires the petitioner to file in the Court "a valuation of the property in the form set forth in Sch. 3." In the form of valuation given in this schedule "which is to be used with such modifications, if any, as may be necessary," the petitioner is required to give in Annexure A the valuation of the moveable and immovable property of the deceased and from it is to be deducted the value of the items mentioned in Annexure B, which include (inter alia) "property held in trust not beneficially or with general power to confer a beneficial interest." It is on the net value ascertained after these deductions that the duty is payable. Then follows S. 19-K which lays down in clear terms that "noth-

ing in S. 6 or S. 28 shall apply to probates or letters of administration."

From these provisions it is clear that ad valorem duty is not payable on probate of a will or letters of administration relating to property held by a deceased person wholly or partially in trust, but that the exemption does not extend to property held in trust beneficially or with general power to confer a beneficial interest. The question is whether the present case falls within the exemption or the exception to the exemption. The learned assistant to the Advocate-General has not seriously contested that the shares in question were held by the deceased in trust for the joint Hindu family, but he contends that the deceased had a beneficial interest in them and, therefore, ad valorem fee is payable. This identical question was raised in 48 Bom. 75⁵ but was rejected by the Full Bench. The matter is fully discussed in the leading judgment of Shah A. C. J., and as I am in respectful agreement with his reasoning and conclusion, I may take the liberty of quoting in extenso the following paragraph from it :

"As regards the meaning of the expression 'the property whereof or whereto the deceased was possessed or entitled wholly or partially as a trustee' in S. 19-D in its application to joint family property with the incident of survivorship governed by the Mitakshara . . . it must be remembered that while the holder, a member of the family, in one sense is beneficially interested in the whole, the other members of the coparcenary are also beneficially interested in the whole, and the beneficial interest of the holder is limited by the extent of the interest of other members. Further, that interest disappears altogether on his death : and the survivors become the sole beneficiaries in the estate which stands in the name of the deceased person. On his death what is called his estate is no estate of his : and the legal title which still continues in the dead man is really the title of a man, whose beneficial interest in the property on his death is nothing. As regards property of this character it could properly be said that the deceased died possessed of it or was entitled to it either wholly or partially as a trustee within the meaning of S. 19-D. I do not think that the words used in the Schedule, viz., 'property held in trust not beneficially or with general power to confer a beneficial interest' conflict with this view. I do not say that the point is free from difficulty. But if the rule of construction to be applied to an enactment of this nature is, as I think it should be, that a liberal construction ought to be given to words of exception confining the operation of the duty, I think that the words have been rightly construed to cover a case of joint family property held by a coparcener for the joint benefit of himself and others and in which his beneficial interest ceases on his death, so that at the date of his death his legal title or possession is without any beneficial interest therein. He would have no power on his death to confer a beneficial interest as he would have, for instance, in the case of his self-acquired property."

The learned Judges of the Full Bench disagreed with the judgment of Beaman J. in 39 Bom. 245⁹ and approved 29 Bom. 161,¹⁰ where Jenkins C. J. and Batty J. had reached the same conclusion,

9. (15) 2 A.I.R. 1915 Bom. 18 : 28 I. C. 478 : 39 Bom. 245 : 17 Bom. L. R. 169, Kashinath Parshram v. Gouaravabai Mallappa.

10. (105) 29 Bom. 161 : 6 Bom. L. R. 652, Collector of Kaira v. Chunilal Harilal.

4. (96) 23 Cal. 980 : 1 C. W. N. 31, In re Pokur Mull Angurwallah.

5. (24) 11 A. I. R. 1924 Bom. 228 : 77 I. C. 749 : 48 Bom. 75 : 25 Bom. L. R. 1240 (F. B.), Keshav Lal Punjalal v. Collector of Ahmedabad.

6. (10) 33 Mad. 93 : 4 I.C. 1064 : 19 M. L. J. 591 (F.B.), In re Dasu Manavala Chetty.

7. (35) 22 A.I.R. 1935 All. 449 : 154 I.C. 722 : 57 All. 881 : 1935 A. L. J. 391, In re Lal Madho Prasad.

8. (39) 26 A.I.R. 1939 Pat. 136 : 180 I. C. 17 : 17 Pat. 542 : 30 P.L.T. 181, Rama Prasad v. Collector of Shahabad.

a holding that shares in joint stock companies, purchased with joint Hindu family funds but standing in the name of one of its members, was property held in trust by the deceased for the joint family and that no court-fee was payable on letters of administration limited to such shares. In that case it was also held that the view expressed by Chandavarkar and Aston JJ. in 27 Bom. 140¹¹ that the exemption of trust estates from the payment of ad valorem duty under S. 19-D was conditional on the circumstances that there had been a previous grant of probate or letters of administration on which a court-fee had been paid was erroneous, the exemption having reference to the character of the property and not the procedure adopted.

In Calcutta the question came up for decision much earlier. It may be stated that the Court-fees Act, as originally passed by the Legislature in 1870, did not contain any provision (like S. 19D, S. 19-I or Sch. 3) exempting trust property from payment of court-fee leviable on probate or letters of administration. Accordingly in 7 Beng. L. R. (O.C.) 57,¹² it was held that the duty prescribed in Art. 11, Sch. 1 was payable not only on property to which the deceased was beneficially entitled during his lifetime but also to property which stood in his name as trustee or of which he was possessed benami for others. In order to do away with the effect of this decision the Government of India issued a notification under S. 35 remitting "the fee chargeable under Art. 11 in respect of probate of wills or letters of administration relating to property which a deceased person was possessed of, or entitled to, not beneficially but as a trustee for any other person or persons, except in cases in which a trustee had the power of appointing or otherwise conferring a beneficial interest in the said property."

Under this notification it was held by Couch C.J. in 19 W.R. 230¹³ that letters of administration in respect of money in Government Savings Bank and Government securities belonging to a joint Hindu family but standing in the name of two of its members were trust property and the half share in the name of the deceased was exempt from payment of duty. The matter received legislative sanction two years later when by Act 18 of 1875, S. 19D was added in its present form, the phraseology being borrowed from 55 Geo. III, c. 184 S. 33; and subsequently S. 19-I and Sch. 3 were inserted by Act 11 of 1899. After the addition of S. 19D the question came up for consideration before the Calcutta High Court in 23 Cal. 980⁴ in these circumstances. Certain properties had been purchased by two brothers who were members of a joint Hindu family, with the money of the joint family, the deed being in their name alone and showing them as holding the property as tenants-in-common. One of the brothers died, having left a will of which he appointed the other brothers as executors and trustees. On an application for grant of a probate, exemption from payment of probate duty was claimed under S. 19D. It was maintained that the properties, having been acquired by the two brothers on behalf of all the coparceners, the conveyances, though they purported to convey the properties to the brothers as tenants-in-common could only operate as conveying them to the brothers in trust for all the coparceners. This

position was accepted by Ameer Ali and Sale JJ., who held that the case fell within S. 19D and the properties having vested in them as trustees for the benefit of all the coparceners, were not liable to duty.

In Madras this view has not been accepted in its entirety and it has been held in 33 Mad. 939 that ad valorem court fee is payable on the value of the "share" which the deceased would have got if the property had been divided just before his death. In coming to this conclusion the learned Judges took note of the fact that the Mitakshara law, as administered in that Presidency, differed from that applied in Northern India, inasmuch as an undivided coparcener has the power to mortgage or alienate his undivided interest and can at any time enforce partition of his own interest. He could not therefore be said to hold this interest of the undivided property as trust property "not beneficially or with general power to confer a beneficial interest in it" within the meaning of these words as used in Annexure B of the form for valuation in Sch. 3 of the Act. With great respect, it is difficult to see how the conclusion follows from the premises. It is no doubt true that according to the Mitakshara law, as prevailing in Madras and Bombay Presidencies, a coparcener may sell, mortgage or otherwise alienate for value his undivided interest in coparcenary property, without the consent of the other coparceners. But as pointed out by Shah Ag. C. J. in 48 Bom. 755 at p. 87, this limited power cannot alter the character of the property. If a coparcener simply alienates his interest for consideration and dies the next day without effecting partition, the purchaser would not get his "interest", as it would cease to exist before it is seized. Moreover, in the southern presidencies also, a coparcener cannot make a gift of his undivided interest; nor can he dispose of it by will. Such limited power of dealing with the property cannot therefore make any difference in the character of the deceased's title to, or possession of, the property at the time of his death. But be that as it may, these considerations do not apply to the Mitakshara family in the Punjab. Here, as in Bengal, Bihar, the United Provinces and other places in Northern India, no coparcener can alienate even for value his undivided interest without the consent of his other coparceners, unless he is the karta of the family and the alienation has been made for legal necessity. Further, in the Punjab the right to have the joint property partitioned is much more restricted; here, for instance a son cannot enforce partition in the lifetime of the father, 105 P. R. 1917.¹⁴ The considerations which weighed with the learned Judges in the Madras case therefore do not apply in this province and it cannot be said that a coparcener holds any part of the property in trust beneficially for himself, within the meaning of Annexure B of the Schedule.

Lastly, there is the decision of the Allahabad High Court in 57 All. 881,⁷ which goes much further than Madras. In that case it was held that full court-fee is payable on letters of administration in respect of the shares in a bank, which had been purchased with joint family funds but which stood in the sole name of one of the coparceners till his death. In coming to this conclusion, and differing from the Full Bench of the Bombay High Court in 48 Bom. 755 the learned Judges relied principally on S. 6, Court-fees Act, and observed that in a case like this, the question of the duty payable on letters

11. ('08) 27 Bom. 140 : 4 Bom. L. R. 974, Collector of Ahmedabad v. Savchand.

12. ('71) 7 Beng. L. R. (O.C.) 57 : 15 W. R. 456, In re H. B. Beresford.

13. ('73) 19 W. R. 230 : 11 Beng. L. R. App. 39, In re Brindabhan Ghose.

14. ('18) 5 A. I. R. 1918 Lah. 291 : 43 I. C. 667 : 105 P. R. 1917 (F.B.), Hari Kishan v. Chandu Lal.

of administration was to be determined by S. 6, Court-fees Act, read with Art. 11 of Sch. 1 and not by S. 19-D. It appears however that the attention of the learned Judges was not drawn to S. 19K of the Act, which expressly provides that "nothing in S. 6 or S. 28 shall apply to probates or letters of administration." The learned Judges further observed that all that S. 19D laid down was that where letters of administration of the effects of a deceased person had been issued and court-fee had already been paid thereon, though not sufficient, the holder may nonetheless recover the property, and the opposite party cannot resist his claim on the ground that full court-fee had not been paid. With great respect this, again, is not a correct interpretation of S. 19D, which deals with property held by the deceased, either wholly or partially as a trustee and, read with the Annexure to Sch. 3, exempts such property from payment of duty. As pointed out by Jenkins C. J. in his elaborate judgment in 29 Bom. 161,¹⁰ the applicability of S. 19D is not conditional on the circumstance that there had been a previous grant of a probate or letters of administration. With the greatest respect I find myself unable to accept any of the reasons given in support of their conclusion in 57 All. 881⁷ as sound. This decision was followed by the Patna High Court in 17 Pat. 542⁸ without any additional reasons being given in support of that view.

After giving the matter careful consideration, and for the reasons given above, I have no doubt that the law was correctly laid down by the Calcutta High Court in 23 Cal. 980⁴ and the Bombay High Court in 48 Bom. 75⁵ and following those cases I hold that the shares in question, having been held by the deceased in trust for the family, no duty is payable in the letters of administration in respect thereof. I would accordingly accept this appeal and, in modification of the order of the lower Court, direct that letters of administration do issue to the petitioner without payment of any court-fee. Having regard to all the circumstances, I would leave the parties to bear their own costs throughout.

DALIP SINGH J.—I agree.

BECKETT J. — I am in full agreement with all that is said in the judgment of my learned brother Tek Chand J. and I only wish to add a few remarks in the hope that they may be of assistance when similar applications have to be drafted in future. As has already been remarked, the application in this case has not been very well drafted, and it appears to be based on a misunderstanding of the true legal position. At first sight, it may seem to be a surprising proposition that anyone should be allowed to make use of the civil Courts for the purpose of administering the estate of a deceased person without paying any court-fee at all. This is not what actually happens. A court-fee is always paid on the original application under the appropriate clause of Art. 1 of Sch. 2, Court-fees Act; and if the estate be small or much encumbered with debt, this may be all which has to be paid. The assets have to be added up and the debts deducted; and if the amount or value of the property in respect of which letters of administration are to be granted does not exceed Rs. 1000, no fee is chargeable thereon (S. 19 (viii), Court-fees Act). Further, exemption is allowed under S. 19D of the Act with regard to property of which the deceased has been acting only as a trustee.

The position of a Hindu is peculiar. In the ordinary way, as a member of a joint Hindu family, he would leave no surviving estate to be administered,

his own interest in the joint family property having lapsed on his death. But if he happens to be a trustee in his individual capacity, administration of the trust property will be necessary. Such property may represent practically the whole of his separate estate, which will then be entirely covered by the exemption. The estate will thus stand on the same footing as other estates with a net value of less than Rs. 1000 on which no further court-fee is payable. It is stated in 57 All. 881⁷ that S. 19D implies that letters of administration have been issued and court-fee already paid thereon, though not sufficient. As just pointed out, however, a Court may issue letters of administration on which no fee is payable, apart from the original court-fee on the application; and if the whole of the estate is exempted, as being trust property or practically the whole of the estate, no question of any further fee arises. The only question, therefore, is whether the estate in respect of which exemption is claimed under S. 19D is in fact trust property. Cases of this kind have sometimes been treated as raising the question whether the karta of a joint Hindu family should not be treated as being in that capacity a trustee for the other members of the family. In particular, reference may be made to the following observations by Wort J. in 17 Pat. 542⁸:

"As I said at the commencement of my observation, the only point to be determined in this case was whether Amir Chandra was a trustee for his coparceners. In my judgment, with great respect to the decision of some of the learned Judges to which I have referred, it seems to me impossible to contend that a cosharer member of a joint family interested to the extent of an undivided share in the whole of the property of the joint family is a trustee for the other cosharers. I repeat it is impossible to hold that view."

With all respect, it seems to me that an element of confusion is liable to be introduced if the position is stated in this way. The question here is whether the property covered by the application stands on the same footing as what is generally known as "trust property": that is, property held by a person in his own name but for the benefit of some one else. There may be and there usually is some property owned by the joint family in its own name, that is, the name under which it usually has business dealings. When such property is in the charge of a karta, it does not seem to me that his position can be essentially different from that of a managing partner or an agent, either of whom may be regarded as occupying a position of trust for certain purposes and so become subject to many of the obligations of a trustee in respect of the property under his charge. This does not, however, mean that the joint property can be treated as trust property in the sense mentioned above, any more than property held by a man in his own name becomes trust property merely because it has to be entrusted to an agent for management. The position however, would be quite different if the managing agent became legal owner of the property in his own name, although the intention was that the beneficiary interest should belong to the firm with which he was connected.

The question is not whether joint family property should be regarded as trust property merely because it happens to be under the management of a karta, as it will generally be found to be; but whether the karta may not sometimes be a trustee in the strict sense in respect of certain property which he holds in his own name alone. At first sight, the application in the present case might

seem to be based on the broad proposition that any joint family property in the hands of a karta is necessarily trust property, though I think it was made sufficiently clear in the course of the proceedings that this was not the only basis on which the claim was being made. Had this been all there was in the matter, then I think that the answer would have been that given in 56 P.R. 1919,¹⁵ namely that no letters of administration could be issued, the estate having already passed by survivorship.

The position, as I have said, is quite different when the karta purchases property in his own name alone but with the intention of holding it for the benefit of the family as a whole. I think my learned brother has already made the distinction quite clear, but it seems to me that the point is one which cannot have too much emphasis laid upon it, since it is one which frequently arises, not only with regard to shares in banks in respect of which there are statutory restrictions, but also with regard to many other kinds of property, in respect of which there may be many perfectly legitimate reasons for making it desirable that the purchase should be made in the name of a single member of the family, not necessarily the senior member. If the purchase is made with funds belonging to the joint Hindu family, the position would clearly be one of a resulting trust. In England, such trusts are confined to purchases made in the name of strangers, but the Privy Council has made it clear that this restriction does not apply to India; and I do not think that there can be any doubt that when property is purchased by the karta of a joint Hindu family out of the family funds, the presumption must be that the intention is to hold the property for the benefit of the family.

The only question that remains is whether the question of duty is in any way affected by the fact that the karta has a beneficiary interest of his own in the property during his lifetime, and here again I think that my learned brother has made the position clear. The karta has only a life interest, which passes at his death. The whole of the beneficiary interest then passes at once to the surviving members of the family, leaving nothing to be passed on except the empty legal title, that is, the duty of administering the estate as a trustee. Had the estate stood in the name of an outsider, the position would be immediately clear and it would hardly be suggested that full administration fees should be paid on the estate whenever the trustee happened to die. I do not think the position is materially altered merely because the trustee happens to have had a life interest in the estate as a beneficiary.

On this view, I think that an application for letters of administration in a case of this kind would make the position much clearer if it began by setting out that the deceased was a member of a joint Hindu family, who had in consequence died possessed of no personal estate of his own except that shown in Annexure A of the prescribed form and that the whole or most of this property was merely held in trust for the benefit of the whole family, for which exemption was accordingly being claimed as shown in Annexure B. It would then be a mere question of fact whether the property was in fact trust property or not a question to be decided in accordance with the ordinary presumptions. The heading to Sch. 3, Court-fees Act, clearly sets out

15. ('19) 6 A.I.R. 1919 Lah. 285 : 51 I.C. 651 : 56 P.R. 1919 : 13 P.L.L. 1919, Mt. Uttam Devi v. Dina Nath.

that it is to be used with such modifications, if any, as may be necessary. A few slight modifications would appear to be necessary when an application is being made in respect of property belonging to a member of a joint Hindu family, if confusion is to be avoided; but some of the arguments addressed to us in this case appear to have been based on the assumption that the prescribed form is not liable to modification when required. For reasons already given I agree with the decision proposed.

G.N./R.K.

Appeal accepted.

Hindu Law —

- (a) ('40) Mulla, Page 233, Pt. (z) ; Page 233, Pt. (m).
- (d) ('40) Mulla, Page 234, Pt. (d).
- ('38) Gour, Page 415, Pts. (2) & (3).
- (e) ('40) Mulla, Page 234, Pt. (i).
- ('38) Gour, Page 415, Pt. (s).
- (f) ('40) Mulla, Page 379, S. 307, Note "The Punjab."
- ('38) Gour, Page 600, S. 180.
- (h) ('40) Mulla, Page 267, S. 237.
- ('38) Gour, Page 446, Para. 1162.
- (i) ('40) Mulla, Page 247, S. 223.
- ('38) Gour, Page 437, Para. 1143.

* A. I. R. (29) 1942 Lahore 179

ABDUL RASHID J.

*Royal Calcutta Turf Club, Calcutta —
Defendant — Appellant*

Kishen Chand Manchanda —

Plaintiff — Respondent.

First Appeal No. 119 of 1941, Decided on 17th December 1941, from order of Senior Sub-Judge, Lahore, D/- 21st June 1941.

* (a) Civil P.C. (1908), O. 7, R. 11, O. 41, R. 23, O. 43, R. 1 (u) — Trial Court deciding preliminary issue in suit regarding maintainability of suit on evidence relied on by parties and dismissing suit with costs—Appellate Court holding suit maintainable remanding case to trial Court—Order of trial Court held not one under O. 7, R. 11 and second appeal held competent from order of appellate Court.

On an issue as to whether the plaintiff did or did not disclose a cause of action the Court considered the evidence relied on by both parties and holding that there was no cause of action dismissed the suit with costs as not being maintainable. The appellate Court allowed the appeal holding that the plaintiff disclosed a cause of action and remanded the case to the trial Court for further proceedings :

Held that the decision of the trial Court could not be regarded as a rejection of the plaintiff but must be taken to be an adjudication on matters raised by the defence nor could it be said that the appellate Court had remanded the suit for the admission of the plaintiff. Therefore a second appeal was competent from the order of the appellate Court : *Case law referred.* [P 182 C 1]

(b) Practice—Evidence—Document admitted by parties to be correct.

Where all documents of evidence are admitted by both parties to be correct, it is not necessary to formally tender these documents in evidence.

(c) Club—Turf Club—Registration of horses — Effect of, explained. [P 182 C 1]

Horses are registered for a specified purpose, that is that they would become eligible to enter races. Various expenses are incurred by the owner in order to acquire this eligibility. Therefore by registering the horses the Turf Club gives an implied assurance to the owner that his registered horses will be allowed to run in races unless their entries are refused by the Stewards of the Club: ('34) 21 A.I.R. 1934 All. 208, *Disting.* [P 184 C 1]

(d) Jurisdiction—Bar of—Turf Club—Dispute between horse-owner and Club—Orders of Stewards—When civil Courts can interfere, explained.

If a matter in dispute between the horse-owner and the Turf Club is within the jurisdiction of the Stewards and they give the person against whom action is intended to be taken a fair opportunity of answering the charges made against him it is not open to the civil Courts to sit on judgment on the orders passed by the Stewards. It is, however, for the civil Courts to determine whether a certain matter in dispute is within the jurisdiction of the Stewards and if so, whether they have acted in accordance with the elementary principles of natural justice and fair play. The jurisdiction of the civil Courts can only be exercised within these narrow limits.

[P 186 C 1]

S. C. Isaacs and Ishwar Das Khanna —

for Appellant.

Jagan Nath Aggarwal and Vishnu Datta —

for Respondent.

JUDGMENT. — The material facts of the case, for the purposes of this appeal, may be shortly stated. The plaintiff Mr. Kishen Chand Manchanda keeps a number of horses and enters them in various race meetings every year. Defendant 1, the Royal Calcutta Turf Club, (hereinafter referred to as the Turf Club) organizes horse racing at Calcutta and races are run under the rules framed by this Club at several other stations also. The plaintiff's case is that defendant 1 published and circulated a prospectus at Calcutta and other centres, including Lahore, for the Monsoon Meeting in the year 1940. The plaintiff wrote to the Turf Club intimating his intention to run six horses and asking for six stables to be allotted to him in terms of the prospectus. He sent a cheque for Rs. 60 to the Secretary of the Turf Club as entry fee for these horses. The Secretary informed the plaintiff at Lahore that his cheque had not been received within the stipulated time and, therefore, his entries had been refused for the first day. There had been some difficulty about cashing this cheque, and the plaintiff had, therefore, to send another cheque in lieu thereof for Rs. 60-4-0. The plaintiff was annoyed at the action of the Secretary in respect of the non-acceptance of the first cheque and he, therefore, appealed to the Stewards of the Club. During the progress of the Monsoon Meeting and after several horses of the plaintiff had taken part in a number of races a dispute arose between his trainer and the syces employed by him. The syces struck work and their services were dispensed with by the trainer of the plaintiff. The syces made a false report to the acting Secretary to the effect that they had been beaten, that their services had been wrongfully dispensed with and that their return fare had not been paid. The Secretary took cognizance of the complaint of the syces and arranged that an enquiry should be held by the Stipendiary Steward of the Club without referring the complaint to the plaintiff for a reply. The plaintiff did not submit to this enquiry and took up the position that it was a

domestic affair between his trainer and his syces and that the Stipendiary Steward had no jurisdiction to make an enquiry into the false complaint lodged by the syces. Several letters were exchanged between the Secretary and the plaintiff which created a good deal of unpleasantness as a result of which the plaintiff was informed by a letter, dated 7th September 1940, that the Stewards of the Club had decided to refuse all entries from the plaintiff for 14th September 1940 and that in future meetings also his horses would not be allowed to run. This decision of the Turf Club was communicated to the Lahore Race Club (defendant 2). As a result of this communication, the plaintiff was prevented from entering his horses at the Lahore races also. On these allegations the plaintiff prayed that he be granted a decree to the effect that he was entitled to enter and run his horses for race meetings under R. C. T. C. rules of racing and otherwise and that the defendants be restrained by mandatory injunction from refusing the entries of the plaintiff's horses in future.

It was pleaded on behalf of defendant 1 inter alia that as no part of the cause of action had arisen within the jurisdiction of the Lahore Courts the suit was not cognizable at Lahore. It was also pleaded that the plaintiff did not disclose any cause of action as under the rules of the Turf Club the Stewards had absolute discretion to refuse any entry and the plaintiff could not claim to run his horses at any of the meetings arranged by the Turf Club as a matter of right. Defendant 2 also pleaded that the plaintiff did not disclose any cause of action that race meetings were organized under rules framed by various race clubs and the authorities of the clubs had full discretion in refusing or admitting any entries they liked. The discretion of the clubs could not form the subject-matter of any litigation, even though such discretion may have been exercised in an arbitrary or capricious manner. On these pleadings the trial Court framed the following two issues: (1) Has this Court jurisdiction to hear this action and grant the plaintiff the relief claimed against defendant 1? (2) Do not the allegations in the plaintiff disclose a cause of action?

On issue 1 it was held by the trial Court that the suit so far as it related to the issue of a mandatory injunction restraining the defendant from refusing the plaintiff's horses entries in future was not maintainable at Lahore, "but that the suit in so far as an injunction was desired against defendant 1 restraining that defendant from interfering with the plaintiff's right to run his horses in meetings held by defendant 1 was entertainable at Lahore." It was further held that as against defendant 2 the suit was entertainable at Lahore in its entirety. On issue 2 the trial Court held that the plaintiff did not disclose what legal right of the plaintiff had been infringed by the defendants. It was further held that even if the plaintiff had a cause of action such cause of action had been taken away by R. 26 of the rules of the Turf Club, which gave the Stewards absolute discretion to refuse or accept any entries for any of their race meetings. On these findings the suit was dismissed with costs. On appeal by the plaintiff the learned Senior Subordinate Judge held that the Lahore Courts had jurisdiction to entertain the suit in its entirety against both the defendants. It was further held that the trial Court had confused the question of relief admissible under the circumstances with the question as to whether the plaintiff did or did not disclose a cause of action. After giving a finding that the plaintiff disclosed a cause of action the learned Senior

Subordinate Judge remanded the case to the trial Court for further proceedings in accordance with law. Against this decision two appeals have been preferred to this Court, one by the Turf Club and the other by the Lahore Race Club. In this judgment I will deal with the appeal preferred by the Turf Club.

At the hearing Mr. Jagan Nath Aggarwal raised a preliminary objection, on behalf of the respondent, to the effect that no second appeal was competent in this case. Very elaborate and lengthy arguments were addressed to me by both parties on this preliminary objection. The learned counsel for the respondent contended that the order of the trial Court dismissing the suit was in substance an order under O. 7, R. 11, Civil P. C., rejecting the plaintiff. The learned counsel argued that if a trial Court comes to the conclusion that the plaintiff does not disclose a cause of action it is its duty to reject the plaintiff and that if the Court after holding that the plaintiff discloses no cause of action dismisses the suit the order of dismissal is still an order under O. 7, R. 11 of the Code. An appeal lies against this order as the rejection of the plaintiff has to be deemed to be a decree under the definition of decree in S. 2 of the Code. The order of the learned Senior Subordinate Judge on appeal holding that the plaintiff disclosed a cause of action merely amounted to a direction to the trial Court to admit the plaintiff and to begin the trial of the suit on the merits. Such an order was not appealable. The learned counsel relied on a number of authorities in this connexion. In 6 C.L.J. 214¹ the Court of first instance rejected the plaintiff on the ground that it contained two inconsistent claims and the Court of appeal held that the plaintiffs were entitled to press both claims in one suit and directed the first Court to proceed with the trial of the suit on its merits. In these circumstances, it was held on appeal by the defendant that the order of the Court of first instance was an order rejecting the plaintiff and, therefore, a decree, and the order of the appellate Court was an order admitting the plaintiff which not being a decree, nor an order under S. 562, Civil P. C., was not appealable. It was held in A. I. R. 1929 Lah. 83² that an order of an appellate Court setting aside an order of the Court of first instance rejecting a plaintiff and directing it to proceed with the trial of the suit on the merits is not an order under O. 41, R. 23, and is not appealable under O. 43, Rule 1. This was a judgment by Addison J. A Letters Patent appeal was preferred against this judgment and the decision of the Division Bench is reported in A.I.R. 1931 Lah. 497.³

It was urged before Shadi Lal C. J. and Broadway J. that the trial Court rejected the claim and not the plaintiff and that the order of the first appellate Court should, therefore, be treated as an order setting aside the decision of the Court of first instance on a preliminary point and remitting the case for a fresh decision. The Bench, however, observed that this contention ran counter to the express wording of the decree which was framed by the Court of first instance. I sent for the High Court record of this case but the decree of the Court of first instance could not be traced. It appears, however, that though in the judgment the Court of first

instance observed that the claim had been rejected, in the decree it was stated that the plaintiff had been rejected under O. 7, R. 11 of the Code. In A. I. R. 1937 Lah. 380⁴ it was laid down by Goldstream J. that when a plaintiff has been rejected for want of compliance with the provisions of S. 80, Civil P. C., the order of rejection must be regarded as one passed under O. 7, R. 11, Civil P. C., and not as a judgment disposing of a suit on a preliminary point. In such a case an appeal does not lie against the order of the appellate Court setting aside an order of the Court of first instance rejecting a plaintiff under O. 7, R. 11 of the Code and directing the trial Court to proceed with the trial of the suit. In my opinion the authorities referred to above are not applicable to the facts of the present case. In all the reported cases the trial Court had definitely passed an order under O. 7, R. 11 of the Code rejecting the plaintiff. In the case reported in A. I. R. 1929 Lah. 83² the trial Court "rejected the claim." When, however, a decree-sheet was prepared it was stated therein that the plaintiff had been rejected under O. 7, R. 11 of the Code. In the present case the trial Court after deciding the two preliminary issues framed by it dismissed the suit with costs. The decree framed by the Court also states that the plaintiff's suit is dismissed with costs and that he shall pay costs separately to defendants 1 and 2. The costs were taxed on the ordinary scale applicable to the decision of the suit on the merits.

Mr. Jagan Nath contended that the plaintiff can be rejected at any stage, that if the Court uses phraseology which is not in accordance with the provisions of the Civil Procedure Code the order must still be regarded as the rejection of the plaintiff under O. 7, R. 11 and not a dismissal of the suit. In this connexion reliance was placed on A.I.R. 1935 Cal. 764.⁵ In this case on an application by the plaintiff an amendment of plaintiff by addition of a relief for possession of the suit property was allowed and he was directed to give the value of the property and to put in the deficit court-fee in view of the relief claimed. On his failure to comply with the order, the Court dismissed his suit in default and refused to allow him permission to withdraw the suit under O. 23, R. 1, Civil P. C. In these circumstances it was held that the proper order in the circumstances would not be a dismissal of the suit but the rejection of the plaintiff under O. 7, R. 11, Civil P. C., and that the effect of the order of dismissal would be the same as if the Court had passed the order in correct form, namely an order rejecting a plaintiff. A fresh suit was, therefore, not barred by any provisions of the Civil Procedure Code. This case falls directly under cl. (b) of R. 11 of O. 7. The relief claimed was under-valued and as the deficiency in the court-fee was not made good the Court was bound to reject the plaintiff without deciding any issue arising in the suit. The merits of the case were not taken into consideration at all.

In the present case issue 2 was to the effect whether the allegations in the plaintiff disclosed a cause of action. In deciding this issue the Court, however, went much further than the terms of the issue and considered at great length the question as to whether the present suit was or was not maintainable. Both parties had stated in the trial Court that the Rules of Racing framed by the R. C. T. C. were binding on them. A printed book embodying these

1. (07) 6 C.L.J. 214, Braja Lal v. Upendra Krishna.
2. (29) 16 A. I. R. 1929 Lah. 83 : 108 I. C. 597, Cotton Trading Syndicate Commission Agency v. Malawa Mal-Shiv Ram Das.
3. (81) 18 A.I.R. 1931 Lah. 497 : 131 I.C. 750 : 82 P.L.R. 409, Cotton Trading Syndicate Commission Agency, Bombay v. Malawa Mal-Shiv Ram Das.

4. (87) 24 A.I.R. 1937 Lah. 380 : 173 I.C. 365 : 39 P.L.R. 720, Basheshar Nath v. Bidhi Chand.
5. (35) 22 A. I. R. 1935 Cal. 764 : 160 I. C. 88 : 40 C. W. N. 1390, Kiran Chandra v. Purna Chandra.

rules was placed on the record. Similarly rules framed by the Lahore Race Club were also produced. Prospectuses of the two Clubs and the correspondence that had taken place between the plaintiff and defendant 1 was also placed on the record. These were all items of evidence which were admitted by both parties to be correct. In these circumstances, it was not necessary to formally tender these documents in evidence. During the arguments in the trial Court the plaintiff relied on Rr. 42 to 55 of the Rules of the Turf Club and argued that a completed contract had come into existence between him and defendant 1 by the registration of his horses by the Club under the above mentioned rules. The plaintiff, therefore, relied on certain items of evidence in the case. Defendant 1 contended that registration of horses did not bring any contract into existence between the plaintiff and the Turf Club and that even if it be assumed that such a contract did come into existence the Stewards of the Club had absolute discretion to refuse or cancel entries under R. 26 of the Rules of Racing. Both sides having relied on the rules the trial Court discussed these rules in detail in its judgment and gave the following finding :

"The exercise of the absolute right, if any, vested in the plaintiff to run his horses is subject to the rules of the Club in the activities of which he desired to take part. The right becomes a qualified right, the qualification being that it is within the discretion of the Stewards of the Club to accept or not to accept plaintiff's entries. As the rules are binding on the plaintiff he cannot give the go-by to those rules and say that he has been unjustly treated by the Stewards of the Club and that a Court of law should interfere to redress his wrong."

These observations were founded on R. 26. The trial Court repeatedly mentioned in its judgment that in view of the rules, the present suit was not maintainable. In conclusion the trial Court passed an order dismissing the suit with costs and awarded costs separately to each one of the defendants. It was never intended by the trial Court to reject the plaint and no order rejecting the plaint was therefore passed. In substance the trial Court decided the preliminary issue in the case dealing with the evidence which was relied upon by both parties, that is the Rules of the Turf Club. The concluding portion of the judgment of the lower appellate Court also does not point out that the suit is being remanded for the admission of the plaint. The case was remanded for further proceedings. It appears that according to the lower appellate Court the defendant had raised a legal contention to the effect that no actionable wrong had been committed and that a civil suit was, therefore, not competent. The Court dealt with matters raised in defence also and therefore, the decision of the Court could not be regarded as a rejection of the plaint but must be taken to be an adjudication on matters raised by the defence. In determining whether the plaint has been rejected by the Court of first instance one has to look primarily to the judgment of that Court. The trial Court held in this case, firstly that no contractual relationship between the parties had been brought into existence by the registration of the plaintiff's horses and secondly, that if any contract came into existence giving the plaintiff a cause of action this right had been taken away by the overriding provisions of R. 26. I accordingly hold that a preliminary issue about the maintainability of the suit having been decided by the trial Court, an appeal is competent in this case against the remand order under O. 43, R. 1 (u), Civil P. C.

It was also contended by the learned counsel for the appellant that if the remand order does not fall under O. 41, R. 23, Civil P. C., it is covered by R. 23A of O. 41 framed by this Court, and that even in that case an appeal to this Court would be competent under R. 43 (1) (u) as amended by the rules of this Court. It was urged that either the senior Subordinate Judge has disposed of the case on a preliminary point or has disposed of the case "otherwise than on a preliminary point." If the case has been remanded under S. 151, Civil P. C., then the case has been disposed of otherwise than on a preliminary point and falls within the purview of R. 23A of O. 41 and the order of remand is appealable. It is unnecessary to consider the question of the applicability of R. 23A in view of my decision that the trial Court dismissed the suit as being not maintainable and did not merely reject the plaint under O. 7, R. 11.

Before dealing with the law points arising in this appeal, it is necessary to give in some detail the history of the incidents which led to the present litigation. On 4th September 1940, the six syces of the plaintiff presented an application to the Secretary of the Turf Club stating that they had been beaten and abused by the plaintiff at 9 P. M. on the previous day, and that when they had complained about their maltreatment the next morning the plaintiff had wrongfully dispensed with their services in spite of the fact that they had worked to his entire satisfaction for a number of years. The syces further alleged that they were entitled to railway fare from Calcutta to Lahore as they wanted to return home and as they had been brought by the plaintiff from Lahore to Calcutta in order to look after his horses. They prayed that some arrangement may be made for their obtaining the railway fare from the plaintiff. On this application an order was passed on 5th September by the Stewards of the Club that the Stipendiary Steward should make an enquiry into the allegations of the syces. On the same day the Secretary wrote to the plaintiff that a complaint had been lodged against him by six syces, that the Stipendiary Steward will hold an enquiry into the matter at the Club premises at 11 A.M. on the 6th and that the plaintiff should be present at such an enquiry. Mr. Kishen Chand wrote at once to the Stipendiary Steward acknowledging receipt of the letter of the Secretary and enquiring under which of the Rules of Racing was the enquiry to be held. On 6th September the Secretary wrote to the plaintiff that his letter dated the 5th had been handed to him by the Stipendiary Steward. He stated that the enquiry was to be held under R. 26 of the Rules of Racing. He relied in his letter on the following portion of R. 26 :

"To make enquiry into, finally decide and deal with any matters relating to racing whether or not referred to them by the Stewards of a meeting."

The plaintiff sent a reply to this letter the same day. He urged that a dispute between him and his syces was not a "matter relating to racing" and that the Club had no right or jurisdiction to hold an enquiry into the false complaint preferred by the syces against him. On 7th September the Secretary wrote to the plaintiff that the Stewards of the Club will enquire into the complaint of the syces and that the plaintiff should come into the enquiry room at 5.30 P. M. The plaintiff sent a reply the same day that he was taking exception to the Stewards of the Club assuming jurisdiction in a matter that did not concern racing, that the complaint was not in any way connected with racing and that it could more appropriately be agitated in a Court of

a law. He was, therefore, not prepared to attend any enquiry. On the same evening the Secretary wrote to the plaintiff that he had been instructed by the Stewards to inform him that they had decided to refuse and will refuse any entries from him for Saturday, the 14th instant and also to state that his entries for race meetings under R. C. T. C. Rules of Racing will be refused in future. To this letter the plaintiff sent a long reply again questioning the jurisdiction of the Stewards of the Club to settle a dispute between him and his syces. He also referred to certain other incidents but it is unnecessary to reproduce this letter.

b The Turf Club is an unincorporated members' club and the plaintiff is not a member. The governing body of the club consists of five Stewards who are elected every year. The powers of the Stewards of the Turf Club are given in R. 26. Rules 42 to 46 deal with the registration of horses. Rule 42 lays down that no horse can be entered for a race under the Turf Club rules unless he has been registered. Rule 43 lays down the mode of the payment of fees for registration. It is provided by R. 44 that an owner cannot change the registered name of his horse without the permission of the Stewards of the Turf Club and that if such permission is granted a fee of Rs. 300 shall be charged unless remitted or reduced by the Stewards. Rules 45 and 46 lay down penalties if the owner of a registered horse does certain acts in contravention of the rules of the Turf Club. It is enacted by R. 50 that a horse is not qualified to run for a race unless he has been duly entered for the same. It is provided by R. 59 (a) that no entry will be received for any race except upon the condition that all disputes, etc., relating c to the entry shall be decided in accordance with the provisions of the Rules of Racing of the Turf Club and that such decision shall be final.

The first point raised by Mr. Isaacs on behalf of the Turf Club was that the lower appellate Court had erred in holding that "by virtue of registration" of the horses certain rights and obligations were created between the parties which entitled either of them to seek redress in a Court of law if any actionable wrong had been committed. The learned counsel urged that the issue of the prospectus of the Monsoon Meeting was not an offer to the owners of registered horses to do business with them, but was merely an invitation to owners of race horses to make entries. The issue of a prospectus was on the same footing as the advertisement of a manufacturer. When an entry was sent by an owner for d any of the races advertised in the prospectus that constituted an offer by the owner to enter into contractual relationship with the Turf Club. If the offer is accepted by the Stewards a contract between the two parties comes into existence. If the entry is refused by the Stewards there is no completed contract and the refusal of an entry is, therefore, not an actionable wrong. The plaintiff, according to the learned counsel, had no right to get his entries accepted. It was absolutely within the discretion of the Stewards to accept or refuse entries. Their intimation to the plaintiff that they would not receive any entries from him for the races to be held on 14th September 1940 and also for future race meetings merely amounted to a refusal by the club to enter into any contractual relationship with the plaintiff or to do business with him. No one could be forced to enter into business relations with someone else and unless the entry was accepted the Stewards of the Club were merely declining to do business and the letter of 7th September simply

amounted to an intimation to the plaintiff that the Turf Club was not prepared to deal with him. In support of this contention the learned counsel referred to R. 50 which lays down that a horse is not qualified to run for a race unless he has been duly entered for the same. The words "duly entered" mean that his entry has been accepted by the Stewards of the Club. Reliance was placed in this connexion on A.L.R. 1934 All. 203.⁶ It was held in that case that apart from special legislation, it is open to a shopkeeper any time to refuse to deal with any member of the public, and it is not necessary for the shopkeeper to give any reason for his refusal. The opening of a shop is a mere invitation to the public to come into that shop. Such an invitation can be revoked at any moment. It is voluntary and without consideration.

The facts of the case were that Mr. Minck plaintiff entered into the shop of Messrs. Trevellon & Clark at Mussorie and asked for some violets. Owing to some previous events the defendants had issued a notice to all their shops that the plaintiff should not be served if he came to buy any article at their shop. The salesman refused to sell the bunch of violets to Mr. Minck who brought an action for damages for breach of contract and for slander against the defendants. In these circumstances, it was held that the suit was not maintainable as no completed contract had come into existence by the defendants displaying violets for sale. The next case referred to by Mr. Isaacs is reported as (1920) 3 K. B. 497.⁷ In this case the plaintiff desired to be present at the first performance of a play at a theatre. He knew that, in consequence of his having made certain serious and unfounded charges against some members of the theatre staff, an application q for a ticket in his own name would be refused. He, therefore, obtained a ticket through the agency of a friend who bought the ticket at the theatre without disclosing that it was for the plaintiff. When the plaintiff went to the theatre he was refused admission. In these circumstances it was held that the non-disclosure of the fact that the ticket was bought for the plaintiff prevented the sale of the ticket from constituting a contract as alleged, the identity of the plaintiff being in the circumstances a material element. The action therefore failed. The above mentioned two cases were quoted to show that a contract comes into existence only when the customer makes an offer and the tradesman accepts that offer. In the present case it was submitted that the plaintiff was in the position of a customer and the Club occupied the position of a tradesman. The Club could not be compelled to accept the entries of h the plaintiff's horses and therefore no contract of any type whatever came into existence between the plaintiff and the Turf Club. Reference was also made to 47 All. 434,⁸ but that ruling is not in point. It was also urged that the whole claim in the plaint was regarding the future and that a civil Court had no right to order the Turf Club to enter into contractual relationship with the plaintiff in future. Registration of horses merely made the horses eligible to be entered for the races. It did not confer any rights on the owner and did not create any obligation on the part of the Club to accept the horses for races held under their management.

6. (1934) 21 A. I. R. 1934 All. 203 : 147 I. C. 982 : 1934 A.L.J. 43, Trevellon & Clark v. Minck.

7. (1920) 3 K.B. 497 : 36 T.L.R. 782, Said v. Butt.

8. (1925) 12 A. I. R. 1925 All. 253 : 86 I.C. 695 : 47 All. 434 : 23 A. L. J. 219, Ram Ugrah Singh v. Benares Hindu University.

The position taken up by Mr. Jagan Nath, on behalf of the respondent, was that the status of his client and his property had been endangered. The respondent had spent large sums of money in acquiring and registering his horses. If he were not given a chance to enter his horses in the various races organized by the Turf Club his property would dwindle in usefulness and value. Registration of horses, according to the learned counsel, gave rise to a completed contract between the Turf Club on one side and the owner of the horses on the other. Under R. 42 no horse can run in a race organized by the Turf Club unless he has been registered. In order to make a horse eligible for racing the owner has to pay Rs. 10 as registration fee. Under the rules the registered name cannot be changed except with the permission of the Stewards and then also on payment of a fee of Rupees 300. The registered horses cannot run at any unsanctioned meeting. The sale of such horses is also subject to certain restrictions. It was submitted that the disability suffered by the owner of the horses and the payments made by him are for a specified purpose and that is that the registered horses shall be allowed to enter for the races. It was urged that the moment an owner has registered a horse he becomes a client of the Turf Club; by making certain payments he has acquired certain rights; the rights acquired by him may be taken away by certain provisions in the rules of racing framed by the Turf Club but it is for the Courts to determine when a dispute arises whether it falls within the purview of the rules or not.

Having carefully considered the arguments advanced on both sides I am of the opinion that the respondent cannot be regarded as a stranger by the Turf Club in the same manner as Mr. Minck was a stranger to Messrs. Travellion & Clark in the case reported as A. I. R. 1934 All. 203.⁸ Horses are registered for a specified purpose, that is that they would become eligible to enter races. Various expenses are incurred by the owner in order to acquire this eligibility. It seems to me, therefore, that by registering the horses the Turf Club gives an implied assurance to the owner that his registered horses will be allowed to run in races unless their entries are refused by the Stewards of the Club. This conclusion is fortified by the fact that ordinarily no acceptance of the entries is communicated to horse owners. Every entry sent by the horse owner is taken to have been accepted unless refusal of such an entry is communicated to the owner. This shows that the acceptance of an entry is a purely formal matter and that in the absence of a refusal every registered horse whose entry is sent in must be taken to have been accepted for a race. The cases dealing with tradesmen are not applicable in so far as a tradesman has no registered customers and does not charge any fees from a customer for registration. There is a complete absence of any payment by the customer until his offer to purchase an article has been accepted by the tradesman. As a payment is levied for the registration of horses and the owner also suffers a number of disabilities as a result of registration I hold that the registration by the Club embodies an implied assurance that the registered horses will be allowed to run unless for some reason the entries of such horses are refused or cancelled.

The next point urged by Mr. Isaacs on behalf of the Turf Club was that by virtue of Rule 26 and R. 13 (ii) the Club has reserved certain rights for the Stewards. Persons who get their horses registered do so with open eyes. They know beforehand that no horse can be allowed to run unless it has

been duly entered for the race and that to refuse entries is within the discretion of the Stewards. If therefore Stewards refuse any entries it does not give rise to any right of action, in other words any rights acquired by registration by the owners are taken away by the overriding provisions of Rr. 26 and 13 (ii). It was further submitted that as the Stewards have been given absolute discretion it is within their powers to act arbitrarily or capriciously and that the Court cannot enquire into the reasons or the motive of the Stewards in refusing certain entries. Reference was made in this connexion to 1895 A. C. 587.⁹ It was held in this case that no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious. It was further held that the owner of land containing underground water, which percolates by undefined channels and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it: And his right is the same whatever his motive may be, whether bona fide to improve his own land, or maliciously to injure his neighbour, or to induce his neighbour to buy him out. Reference was also made to the case in (1932) 2 K. B. 478.¹⁰ In this case the plaintiff who was a clerk of the course at West Malling pony races in the autumn of 1927, complained that without giving him any opportunity to hear and reply to any charge against him, the Stewards of the Pony Turf Club in March 1929 resolved to put him on the forfeit list on the ground that certain stakes won at West Malling in 1927 had not been paid. It was held that "provided that the matter was within the jurisdiction of the Stewards and if they gave the person affected reasonable notice of what he had to answer and an opportunity of being heard, the High Court was not a Court of appeal from the Stewards. Supposing that the High Court thought that the Stewards came to a wrong decision they had no jurisdiction to give effect to their view. The plaintiff had not undertaken to hold meetings subject to the opinion of the High Court on racing matters, a most unsatisfactory tribunal to deal with racing matters. The plaintiff had undertaken to hold meetings subject to the jurisdiction of the Stewards of the Pony Turf Club, who do know something about racing matters, whereas the High Court does not." It was urged that in view of the two cases referred to above it was not open to a Court of law to question the action of the Stewards as they possessed the power to refuse any entries at their discretion under Rule 26.

In my opinion the learned counsel for the Turf Club is right in so far that the civil Courts cannot substitute their judgment for that of the Stewards. The sufficiency of the reasons for refusal of entries is not for the civil Courts to weigh. The Stewards are the sole Judges whether certain entries ought or ought not to be refused. In (1932) 2 K. B. 478¹⁰ which was relied upon by the learned counsel for the Turf Club it was however laid down that "provided that the matter is within the jurisdiction of the Stewards, and if they give the person affected reasonable notice of what he has to answer and an opportunity of being heard, the High Court is not a Court of Appeal from the Stewards." It is clear

9. (1895) 1895 A. C. 587, Mayor, Aldermen and Burgesses of the Borough of Bradford v. Edward Pickles.

10. (1932) 2 K. B. 478; 101 L. J. K. B. 894, Cookson v. Harewood.

therefore that provided the matter in dispute between the parties is within the jurisdiction of the Stewards, the Stewards' decision is unassailable. It was contended by Mr. Jagan Nath, and, in my opinion rightly, that it was for the Courts to decide whether the matter in dispute in this case lay within the purview of the rules of racing framed by the Turf Club. The whole dispute arose out of the complaint preferred by the syces against the plaintiff, the principal item of dispute being the return fare from Calcutta to Lahore. This matter was entrusted by the Stewards to the Stipendiary Steward for inquiry. The Secretary wrote to the plaintiff that the matter fell within the purview of R. 25, which empowers the Stewards to make inquiry and finally decide "any matter relating to racing." Who was however to decide whether the dispute between the syces and the owner with respect to the return railway fare to Lahore was a matter relating to racing? In other words, it is for the law Courts to determine as laid down in (1932) 2 K. B. 478¹⁰ whether the matter falls within the jurisdiction of the Stewards. In (1874) 9 Ex. 190¹¹ Lord Chief Baron Kelly, speaking of the committee of a mutual marine association or club says: "They are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. The rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals." This was a case of a voluntary association and the action was brought by one of the members. The observations reproduced above are however of general application. The following observations occur in the Privy Council judgment in 1902 A. C. 213¹²:

"If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. . . . In a word the only question is, has the power been exceeded? Abuse is only one form of excess."

It was conceded by Mr. Jagan Nath that if the Stewards of the club for any reason which they consider sufficient, refuse the entries of the plaintiff the plaintiff has no cause of action, provided that the matter in dispute is within the jurisdiction of the Stewards and they give the person affected reasonable notice of what he has to answer and opportunity of being heard. The allegations in the present case are that the matter in dispute was not within the jurisdiction of the Stewards, that even if the plaintiff did not appear the Stewards ought to have held an inquiry in a proper manner and then and then only were they competent to pass an order of the type complained against in the present case. Mr. Isaacs referred to Rr. 71 and 16 and contended that these two rules gave the Stewards power to regulate and control the conduct of all owners, persons attendant on horses and stable servants. It is not for me to determine whether Rr. 71 and 16 cover

the case of the syces employed by the plaintiff. At present the only question for me is whether the case is maintainable. If it is held that it is maintainable then it will be for the trial Court to determine whether the Stewards had jurisdiction to deal with the matter. At the same time, nothing open and detrimental to the plaintiff's case in the case of the syces or the owners of horses can be placed at the disposal of the Stewards. The trial Court unfortunately finds that the Stewards have jurisdiction and that proper opportunity was given to the plaintiff to be heard and that the complaint of the syces is not contrary to the elementary principles of natural justice and fair play the plaintiff is not liable to dismissal, and it would not be open to the civil Court to sit in judgment on the acts of the Stewards. It, however, the trial Court finds that Stewards had no jurisdiction at all, or that proper opportunity was not given to the plaintiff to be heard or that the order in dispute was passed without any inquiry it would be open to the Court to give the plaintiff such relief as he is entitled to.

After Mr. Jagan Nath had concluded his argument and during the course of his reply Mr. Isaacs brought to my notice a confidential letter sent by the Secretary of the Turf Club to the Secretary of the Lahore Race Club stating that the Stewards had decided to exercise their powers under the rules and refuse Mr. Kishen Chand's entries in future as a result of his refusal to attend and inquiry arranged by the Stipendiary Steward, and that they had also taken into account his refusal to see the Stewards. The learned counsel urged that this letter definitely shows that the Stewards had not taken action on the complaint of the syces but that they had decided to refuse the entries of Mr. Kishen Chand as he had failed to appear before the Stipendiary Steward and before the Stewards in an inquiry resulting from the complaint of the syces. Mr. Isaacs urged that the Stewards had ordered that the entries of the plaintiff's horses shall not be accepted in future in exercise of their administrative power. In my opinion, this argument is not open to the Stewards of the Club. The syces made a complaint and the plaintiff was asked to attend the inquiry that was being conducted by the Stipendiary Steward. He refused to do so on the ground that the Club had no jurisdiction in the matter. He was then asked to appear before the Stewards apparently to answer the charges made against him by the syces. As he again questioned the jurisdiction of the Stewards it was open to the Stewards to proceed to hold an inquiry ex parte into the complaint preferred by the syces and as a result of their inquiry to pass a suitable order. It was not open to the Stewards at that time to hold that they would take action against the plaintiff not as a result of the complaint which had given rise to the entire dispute but as a result of the plaintiff raising the objection that they had no jurisdiction in the matter. No rules have been brought to my notice which give the Stewards power to take action against horse-owner simply because he questions their jurisdiction in a particular matter. The quasi-judicial inquiry that was being held by the Stipendiary Steward first and was meant to be held by the Stewards the next day cannot be suspended and action taken against the administrative powers, any, possessed by the Stewards.

To sum up the whole case I am of the opinion that by registering horses the Club gives an implied assurance to the horse-owners that their horses will be allowed to enter for the races conducted by the Turf Club unless their entries are refused or cancelled.

11. (1874) 9 Ex. 190 : 13 P. D. 22 : 30 L. T. 815 : 22 W. R. 709, Wood v. Wood.

12. (1902) 1902 A. C. 213 : 71 L. J. P. C. 39 : 85 L. T. 732 : 87 J. P. 103 : 18 T. L. R. 199, Mayor and Councillors of East Fremantle v. Annals.

c called by the Stewards. Further, if the matter in dispute between the horse-owner and the Club is within the jurisdiction of the Stewards and they give the person against whom action is intended to be taken a fair opportunity of answering the charges made against him it is not open to the civil Courts to sit on judgment on the orders passed by the Stewards. It is, however, for the civil Courts to determine whether a certain matter in dispute is within the jurisdiction of the Stewards and if so, whether they have acted in accordance with the elementary principles of natural justice and fair play. The jurisdiction of the civil Courts can only be exercised within these narrow limits. For the reasons given above I dismiss this appeal with costs.

K.S./B.K.

Appeal dismissed.

C. P. C. —

b (a) ('40) Chitaley, O. 7 R. 11 Note 2; O. 41 R. 23 Note 21 and O. 43 R. 1 Note 12.

('41) Mulla, Pages 611-612 Note "shall be rejected." Pages 1185-1186 Note "Appeal." Page 1206 Note "Clause (u) : Order of remand."

(c) ('40) Chitaley, S. 9, Note 53 Pts. 5 to 7.

('41) Mulla, Page 31 See Pt. (b).

A. I. R. (29) 1942 Lahore 186

TEK CHAND AND BECKETT JJ.

Mian Abdul Aziz — Petitioner

v.

Punjab Government through Chief Secretary, Lahore — Respondent.

c Civil Revn. No. 337 of 1940, Decided on 20th March 1942, referred to Division Bench by Tek Chand J., D/- 22nd April 1941.

(a) Telegraph Act (1885), S. 16 — District Judge acts as civil Court in dealing with applications under S. 16 — High Court can entertain revision against order passed under S. 16.

When a Court normally consists of a single judicial officer, as the Court of a District Judge does, it is quite an ordinary practice in the drafting of Indian statutes for a reference to be made to that officer under his particular title and the intention is to refer to the Court and hence no distinction can be drawn between a reference to the District Judge and a reference to the District Court for deciding whether the authority referred to was acting as a judicial authority : ('26) 13 A. I. R. 1926 Rang. 25 (F. B.), *Not approved.* [P 187 C 2]

a Section 16 was intended to secure a judicial settlement of disputes with regard to compensation. The District Judge should be held to be acting as a civil Court in dealing with applications under S. 16 : 1913 A. C. 546, *Rel. on;* ('31) 18 A.I.R. 1931 Bom. 582, *Ref.* [P 187 C 2; P 188 C 1]

The High Court has power to entertain a petition for revision of the order passed by the District Judge under S. 16. [P 188 C 1]

(b) Telegraph Act (1885), Ss. 16 and 10 — S. 16 refers to sufficiency of compensation to be paid under S. 10 and not to sufficiency of compensation actually paid — Crown refusing to pay any compensation at all — District Judge still can entertain under S. 16 application by party aggrieved.

Section 16 does not refer to the sufficiency of the compensation actually paid but to the sufficiency of

the compensation to be paid under S. 10. If damage is actually caused and Government proposes to pay nothing, while the other party insists that substantial damage has been done, then there is clearly a dispute with regard to the sufficiency of the compensation to be paid under S. 10. Therefore, even if the Crown refuses to pay any compensation at all the District Judge has jurisdiction to entertain an application under S. 16 by the party aggrieved.

[P 188 C 1]

(c) Precedent — Privy Council decision conclusive on a point — Sub-Court cannot follow any other decision or prefer contrary decision of High Court to which it is subordinate.

If any decision of the Privy Council can be regarded as conclusive on a point, there can be no question for a sub-Court of following any other decision or preferring a decision to any contrary effect by the High Court to which the sub-Court is subordinate. [P 188 C 2]

(d) Limitation Act (1908), Art. 181 — Whether Art. 181 applies only to applications under Civil P. C. (*Quære.*)

It is doubtful whether Art. 181 should be held to include only those applications which are made under some definite provision or rule of the Civil P. C.: ('33) 20 A. I. R. 1933 P. C. 63, *Expl.*

[P 188 C 2; P 189 C 2]

(e) Telegraph Act (1885), S. 16 — Application under S. 16 — Art. 181, Limitation Act, does not apply — Application cannot be rejected as barred under any provision of Limitation Act — Doctrine that right may be lost by laches applies — Question of laches is one of fact.

Article 181 does not apply to applications under S. 16, Telegraph Act, those applications being in the nature of complaints. They cannot therefore be rejected as barred by time under any provision of the Limitation Act. In any case the application of Art. 181, Limitation Act, to applications under S. 16, Telegraph Act, would often be futile for the starting point of limitation does not arise when the damage is caused but only when the right to apply accrues; and this in turn does not happen until the dispute with regard to the sufficiency of compensation arises, which may not be until long after the damage is caused. But an application under S. 16, Telegraph Act, should not be allowed to be made after an unlimited period of time by applying the doctrine that a right may be lost by laches. A claim for compensation should be promptly settled, and if the owner of the land chooses to sleep over his rights so as to make it more difficult for the Court concerned to decide what amount of compensation should have been offered in the first instance his application may become liable to dismissal on this ground. But in cases of this kind there may often be reasons for delay. The question of laches is one of fact. [P 189 C 2; P 190 C 1]

*Shabir Ahmad — for Petitioner.**S. M. Sikri for Advocate-General —**for Respondent.*

BECKETT J. — These are three applications presented to the District Judge of Lahore for compensation under S. 16, Telegraph Act, 1885, read with S. 51, Electricity Act, 1910, and decided by the Additional Judge of the District. The facts in each case are so nearly the same that the decision in the first case has been repeated in the others with differences only in the names of the petitioners and in the amounts claimed by them. Pylons for the supply of electricity were erected on the land of

a the petitioners by the Hydro-Electric Department of the Punjab in 1929 and after being temporarily connected were permanently joined in 1933. Although S. 10, Telegraph Act, requires payment for compensation for any damage sustained by all persons interested in the course of such work it appears that no compensation was offered and no claim was made at that time. In 1933 certain additional constructions were made for the purpose of exhibition in 1937, but these were dismantled in 1938. The applicants then demanded compensation for the first time, but this was refused by the head of the Department. The present applications were presented to the District Judge in 1939, after compensation had been refused. The Additional District Judge has rejected the applications, mainly upon the ground that they were governed by Art. 181, Limitation Act, 1908, and that the period of limitation prescribed thereby had expired. The petitioners have now come to this Court for revision of the orders rejecting their applications. There are two main points for consideration. One is whether the High Court is entitled to interfere in revision, and the second is whether Art. 181 applies to such applications. As regards the former point, the suggestion is that the District Judge was intended to act in these matters as a persona designata rather than in a purely judicial capacity. Sub-section (3) of S. 16, Telegraph Act, runs as follows:

"If any dispute arises concerning the sufficiency of the compensation to be paid under S. 10, cl. (d), it shall, on application for that purpose by either of the disputing parties to the District Judge within whose jurisdiction the property is situate, be determined by him."

c There is nothing particular in this sub-section to suggest that the District Judge was intended to act as otherwise than in a judicial capacity when deciding the amount of compensation which should be paid; but counsel for the Crown has referred to a number of authorities in which it has been held that the District Judge or some other judicial officer may be given by statute a duty which he is expected to perform as a persona designata and not as a Court of civil jurisdiction. I do not think it is necessary to refer to these decisions in detail, because most of them do not refer to the assessment of compensation for the infringement of ordinary civil rights, but to such matters as election disputes or the assessment of taxes, which stand upon an entirely different footing. A statute of this kind legalises a form of civil trespass, but at the same time it preserves to some extent the right which d any person affected would previously have enjoyed of seeking his remedy in the form of a civil suit, if not directly against the Crown, at least against those personally responsible. There is a well-known precedent for the award of similar compensation in proceedings under the Land Acquisition Act; and it is difficult to see why it should have been intended to adopt any different method for settling disputes of a similar kind. It is true that one of the cases cited, 40 Bom. 509,¹ refers to a dispute over compensation with the local authorities, but the reasoning in this judgment was later dissented from in 55 Bom. 544.² There does not appear to be any

other judgment in which a District Judge has been held not to be dealing judicially with compensation proceedings under a statute. One case under S. 16 Telegraph Act, came up before me in *Single Bench* and the petition for revision was accepted. But the present point was not then considered and it can hardly be taken as forming a precedent. Something in the nature of a general rule for cases of this kind was laid down by Lord Parker of Waddington in 1913 A. C. 516³ in the form of the following observations:

"Whereby statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same."

f When these remarks were discussed in 3 Rang. 560⁴ in connexion with a case of this kind, it was said (at p. 574) that this was the dictum of a very high authority and that the remarks would have been applicable if the statute then under consideration had referred to Court by that name, instead of referring to a particular judicial officer, and it has sometimes been suggested that a distinction should be drawn between a reference to the District Judge and a reference to the District Court. I think, it may be safely said, however, that when a Court normally consists of a single judicial officer, as the Court of a District Judge does, it is quite an ordinary practice in the drafting of Indian statutes for a reference to be made to that officer under his particular title when the intention is to refer to the Court; and I am personally very doubtful whether it would be safe to draw any distinction on this ground by itself. The Telegraph Act goes on to refer to the Court of the District Judge in the next subsection; and there are references to the payment of court-fees and the issue of processes in S. 54 which seem to suggest that the ordinary machinery of a Court of civil jurisdiction was being made available for the settlement of these disputes. While such references may not be conclusive in themselves, it seems at least probable that the District Judge would be allowed to avail himself of his ordinary judicial powers in arriving at a decision rather than that he would be expected to act in any special capacity without them.

g That this is the assumption which would ordinarily be made is well illustrated by what has happened in the present case. The application was not in fact decided by the District Judge, but by the Additional Judge of the District to whom it was presumably transferred as an ordinary judicial case; but no objection was taken to his jurisdiction. Apart from this, however, I still think that the natural interpretation of S. 16 is to suppose that it was intended to secure a judicial settlement of disputes with regard to compensation. According to S. 3 (15), General Clauses Act, 1887, the "District Judge" in any Act of the Central Legislature means the Judge of a principal civil Court of original jurisdiction other than the High Court in the exercise of its original civil jurisdiction, unless there is anything

1. (16) 3 A. I. R. 1916 Bom. 196 : 34 I. C. 21 : 40 Bom. 509 : 18 Bom. L. R. 340, *Municipality of Belgaun v. Rudrappa*.

2. (31) 18 A. I. R. 1931 Bom. 582 : 134 I. C. 1240 : 55 Bom. 544 : 33 Bom. L. R. 1087, *Municipality of Sholapur v. Tuljaram Krishnasa*.

3. (1913) 1913 A. C. 516 : 82 L. J. K. B. 1197 : 101 L. T. 562 : 29 T. L. R. 637 : 57 S. J. 661 : 15 Ry & Can. Draft. Cas. 109, *National Telephone Co. Ltd., v. Post Master General*.

4. (26) 18 A. I. R. 1926 Rang. 25 : 91 I. C. 550 : Rang. 560 (F. B.), *Municipal Corporation of Rangoon v. M. A. Shakur*.

a repugnant in the context. In the present case I can find nothing in the context to suggest that the reference to the District Judge is not intended as a reference to the District Court, which seems to be the meaning implied by the definition applicable thereto. That being so, I am of opinion that the District Judge should be held to be acting as a civil Court in dealing with applications under S. 16, Telegraph Act. It is still contended, however, that this Court's powers of revision are barred by sub-section (5) of the section, which runs as follows :

"Every determination of a dispute by a District Judge under sub-s. (3) or sub-s. (4) shall be final : Provided that nothing in this sub-section shall affect the right of any person to recover by suit the whole or any part of any compensation paid by the telegraph authorities from the person who has received the same."

b Here again, I do not think that any general rule can be laid down for interpreting a provision of this kind, but phrases of this kind, which are not unusual, cannot in my opinion be taken as intended to override the revisional powers given to a High Court by the Code of Civil Procedure if the underlying intention is that the dispute is to be determined judicially by a civil Court ordinarily subordinate to the High Court. The wording of the proviso indicates that the sub-section was chiefly intended to bar out any other method of settling such disputes, as by means of an ordinary civil suit against the person causing the damage. A similar phrase is used in O. 21, R. 63, Civil P. C., with regard to the summary decision of disputes by executing Courts. Though this rule allows an independent suit to be brought, it provides for a summary decision otherwise to be conclusive. This is taken to bar an appeal, but I do not think it has ever been suggested that it was intended to prevent revision. Even though it may be necessary for this Court to interfere with a matter relating to the exercise of jurisdiction, it would still be for the District Judge to give his decision with regard to the sufficiency of compensation, and his decision would in fact be final. For these reasons, I am of opinion that this Court has power to entertain a petition for revision of the order passed by the Additional District Judge. At this stage it will be convenient to deal with a small point which has been raised on behalf of the Crown. It has been suggested that, if the Crown refuses to pay any compensation at all, there is no dispute concerning the sufficiency of the compensation within the meaning of the Telegraph Act and that the District Judge has no jurisdiction to entertain an application by the party aggrieved. I think we are both agreed that this argument will not stand examination. Section 16 does not refer to the sufficiency of the compensation actually paid but to the sufficiency of the compensation to be paid under S. 10. If damage is actually caused and Government proposes to pay nothing, while the other party insists that substantial damage has been done, then there is clearly a dispute with regard to the sufficiency of the compensation to be paid under S. 10. The second question, that of limitation, is an extremely difficult one. The question is whether Art. 181, Limitation Act, applies. That article runs as follows :

a "Applications for which Three years. When the no period of limitation is provided elsewhere in this schedule or by S. 48, Civil P. C., 1908 right to apply accrues,"

The learned Additional District Judge has based his finding that Art. 181 is applicable on a decision

of my own in A.I.R. 1935 Lah. 982,⁵ in which that article was applied to a similar application. On the other side, reliance was placed on 54 All. 1067,⁶ a case decided by the Privy Council, as a conclusive authority for holding that this article applies only to applications made to Court under some definite provision of the Code of Civil Procedure ; but the Additional Judge held that he was constrained to follow the decision of this Court in A. I. R. 1935 Lah. 982.⁵ This calls for two observations. In the first place, my decision was given in Single Bench without any reference being made to the conflicting decisions on the subject and was certainly not intended to be taken as an authority on the point now under consideration. In the second place, if any decision of the Privy Council could be regarded as conclusive on the point, there could be no question of following any other decision or preferring a decision by this Court to any contrary effect. This first question therefore is to see whether 54 All. 1067⁶ is a conclusive decision with regard to the scope of Art. 181. This was a liquidation case. The question was whether an application made by the liquidators was within time, and it had been argued that the application was barred by Art. 181. In dealing with this argument, their Lordships observed, in the first place, that a series of authorities commencing with 7 Bom. 213⁷ had taken the view that Art. 181 only related to applications under the Code of Civil Procedure, in which case no period of limitation had been prescribed for the applications. But they went on to observe that even if Art. 181 did apply to it, the application was still within time. The resultant finding on the question of limitation was given in the following words :

"The result is that from either point of view the application by the liquidators, if otherwise properly made under and within the provisions of Sec. 186, Companies Act, is not one which must be dismissed by reason of Sec. 3, Limitation Act. It is either an application made within time, or it is an application made for which no period of limitation is prescribed."

If their Lordships had regarded it as finally settled that Art. 181 did not apply, it would have been unnecessary to give the finding in this alternative form. It seems to me that the only possible conclusion to be drawn from the language thus used is that their Lordships intended to leave the question still open, so far as the scope of Art. 181 was concerned, inasmuch as it was not necessary for them to give any final decision on this point, in view of the facts before them. It is thus necessary to revert to the original decisions on the point. The leading authorities are 7 Bom. 213,⁷ mentioned by the Privy Council, and 6 Cal. 707.⁸ Both these decisions relate to applications for probate or letters of administration. They were decided within a short time of each other and the reasoning in each case is much the same. On the face of it, Art. 181 is a residuary article, which appears to apply to any applications made to a Court of civil jurisdiction in the exercise of judicial powers; but reasons were given for hold-

5. ('35) 22 A. I. R. 1935 Lah. 982 : 160 I. C. 636 : 17 Lah. 391 : 38 P. L. R. 883, Hussain Bakhsh v. Secretary of State.

6. ('33) 20 A. I. R. 1933 P. C. 68 : 142 I. C. 7 : 54 All. 1067 : 60 I. A. 13 (P. C.), Hansraj Gupta v. Official Liquidators, Dehra Dun Electric Co. Ltd.

7. ('88) 7 Bom. 213, Bai Manekhai v. Manekji Kavasji.

8. ('81) 6 Cal. 707 : 8 C.L.R. 52, In the matter of Ishan Chunder Roy.

a ing that it could not be held to apply to probate proceedings. In the first place, while the Preamble to the Limitation Act refers to suits and appeals generally, it also applies to "certain applications." Secondly, it was held, the specific articles relating to applications deal with such matters as ordinarily arise under the Civil Procedure Code. From this it was concluded that according to the rule of ejusdem generis, Art. 181 should be treated as applying to applications under the Civil Procedure Code. This view has been followed in a number of other cases; and so far as this province is concerned, it was followed with regard to probate cases by the Chief Court in 20 P. R. 1912.⁹ More recently, however, some doubts have been expressed; and there is a definitely dissenting judgment in 109 I. C. 559,¹⁰ a case decided by the Judicial Commissioner's Court at Nagpur.

b The proposition that the scope of Art. 181 must to some extent be restricted seems obviously correct. There are many applications, mostly of an administrative nature, received by a Court of civil jurisdiction, which could hardly be treated as subject to any strict law of limitation, even though they may be directly or indirectly concerned with the judicial functions of the Court. The only question is where the line should be drawn. The Preamble to the Act does not carry us very far, even if it is possible to attach any particular importance to the wording of a Preamble of this kind. If the rule of ejusdem generis is applied in its ordinary form, the Preamble would include any proceedings which are ordinarily treated by civil Courts as being in the nature of suits. It remains to be seen therefore whether there is anything elsewhere in the Act to suggest that in the future Art. 181 should be held to include only those applications which are made under some definite provision or rule of the Civil Procedure Code. Reasons for doubting whether this could have been the intention are given in 109 I. C. 559¹⁰ and I only think it necessary to give those that appeal most to myself. The first point is a matter of drafting. If the intention was to confine the scope of the article strictly to applications under the Code it is difficult to understand why it should not have been so framed as to refer to any other application under the Code of Civil Procedure, for which no period of limitation was prescribed elsewhere.

c In the second place, it is to be observed that the view taken in 7 Bom. 213⁷ is fundamentally based on the assumption that the preceding articles refer only to such applications as are made under the Civil Procedure Code. An examination of the earlier articles, however, hardly seems to support this proposition, inasmuch as some of the articles relating to applications refer specifically to the Civil Procedure Code, while others do not. It is true that these articles deal with applications which can be made under the Code of Civil Procedure and would ordinarily be so made; but this is merely due to the fact that the Code is a comprehensive compilation of rules of civil procedure, and it is not the same thing as saying that the Act necessarily deals only with applications which are in fact made under the Code. There are a limited number of civil Courts which are expressly freed by statute from following the Code of Civil Procedure; but it is difficult to believe that it could ever have been complained that

such a provision would have the effect of abolishing any period of limitation except such as might be expressly prescribed at the same time. As a matter of fact, there is at least one generally recognised exception to the rule that Art. 181 should be applied only to applications made under the Code of Civil Procedure. 81 Mad. 241¹¹ was a case dealing with an application to a civil Court for delivery of possession under an Act for the recovery of revenue. It was contended that there was no time limit since the application was not one made under the Code. It was held that, inasmuch as such an application was an application for the machinery of the Court to be put in motion, it should be treated as one falling under the provisions of the Code. This view seems to have been generally followed where proceedings in the nature of execution proceedings are concerned.

To some extent the same reason might seem to apply whenever it is intended to invoke the assistance of a civil Court by means of proceedings of which the intermediate stage would be governed by the provisions of the Code of Civil Procedure, as in the present instance. So far as the intermediate stage of judicial proceedings are concerned the Courts generally apply the provisions of the Code whether such proceedings are initiated by means of a plaint or a petition or an application; and it would be difficult to hold that there should be no period of limitation unless the provisions of the Code were directly applicable. The real question here is whether Art. 181 should be taken to apply to initiatory applications, that is, to various applications which take the place of a plaint in proceedings otherwise very much in the nature of an ordinary civil suit. On general grounds there is much to be said on either side. In some cases, as in probate proceedings, there may be good reasons for holding that a strict period of limitation ought not to be applied. In other cases, as pointed out in 109 I. C. 559,¹⁰ the mischief of allowing such applications to be made after any period of time would be very great indeed. This is in fact particularly true of applications for determining the amount of compensation; and there is always likely to be greater difficulty in deciding any matter which involves taking of evidence after a considerable time has elapsed. The question is entirely one of interpretation, however, and it hardly seems possible to evolve a formula which would make it permissible to treat Art. 181 as applying to some applications in the nature of plaints, but not to others.

On the whole, since it is a question of interpreting the terms of a restrictive Act, and since it hardly seems desirable now to adopt a view which would be difficult to reconcile with the settled course of decisions which have held that Art. 181 does not cover such applications as those made for the purpose of taking probate, I am of opinion that the article should not be taken as applying to the applications now under consideration, these applications being in the nature of plaints, and that they should, therefore, not have been rejected as barred by time under any provision of the Limitation Act, 1908. So far as applications under S. 16, Telegraph Act, are concerned it may be observed that in any case the application of Art. 181 would often be futile for the starting point of limitation does not arise when the damage is caused (as the learned Additional District Judge seems to have thought), but only when the right to apply accrues; and this

9. (12) 20 P. R. 1912 : 10 I. C. 180 : 141 P. L. R. 1911, *Indar Narain Shiv Puri v. Onkarlal*.

10. (28) 15 A.I.R. 1928 Nag. 194: 109 I.C. 559: 24 N.L.R. 100, *Sheikh Kawadu v. Berar Ginning Co.*, Ltd.

11. (08) 81 Mad. 24 : 17 M.L.J. 441 : 3 M. L. T. 19, *Sambasiva Mudaliar v. Panchanada Pillai*.

in turn does not happen until the dispute with regard to the sufficiency of compensation arises, which may not be until long after the damage is caused. In the present instance, for example, it does not appear that any compensation was offered in the first instance, as is apparently contemplated by the Act, so that no dispute arose until the demand was made.

So far as any argument on the point of limitation can be based on the mischief which would be caused by allowing an application to be made after an unlimited period of time, this can be met by applying the doctrine that a right may be lost by laches. As already suggested, there are many reasons which make it desirable that a claim for compensation should be promptly settled, and if the owner of the land chooses to sleep over his rights so as to make it more difficult for the Court concerned to decide what amount of compensation should have been offered in the first instance, it is possible that his application may become liable to dismissal on this ground.

The question of laches is one of fact and will have to be so decided in the cases now under consideration; but it may be pointed out that in cases of this kind there may often be reasons for delay. Such claims, it may be noted, are only now coming into prominence. By itself S. 16, Telegraph Act, is only intended to cover damage done by the erection of telegraph poles and lines. The damage occasioned thereby is likely to be very small indeed; and even if a dispute should arise, which is itself not very probable, it would seldom be worth carrying the dispute to the Court of the District Judge. It is a different matter when the section is applied to the scheme for the transmission of electricity in bulk. The immediate damage caused by the erection of pylons may not be very great, but the real trouble arises when the owner of the land suitable for building is not permitted to erect structures within a certain distance of lines which have been energised. Whether this is a matter which can be taken into consideration in determining compensation under S. 16, Telegraph Act, is not a point on which it would be advisable to express any opinion in the present petitions; but it affords some explanation of why disputes are at the moment arising and why there might sometimes be a delay in putting forward claims.

So far as the present applications are concerned, I think it should be enough to say that Art. 181, Limitation Act, does not apply to them, and that they cannot be dismissed merely because the damage was caused more than three years before they were presented, leaving it to the District Judge to decide whether the petitions should still be dismissed on general grounds in view of the delay which has occurred. This is clearly a point which can only be decided after the evidence has been heard and new issues framed, if necessary. I would accordingly accept the petitions and remand the cases to the Additional District Judge for fresh decision. The payment of costs so far incurred may abide the event and stamp fees should be refunded. Parties to appear before the Additional District Judge on 20th April.

TEK CHAND J. — I agree.

G.N./R.K.

Petitions accepted.

C. P. C. —

(c) ('40) Chitaley, Pre. N. 15 pt. 13.

Limitation Act —

(e) ('41) Chitaley, Art. 181 N. 22.

(‘38) Rustonji, Page 1635 Note “Cases not within Art. 181.”

C. P. C. —

(‘40) Chitaley, Ss. 100 and 101 N. 51.

(‘41) Mulla, Pages 366-367 Note “No second appeal . . . of fact.”

* A. I. R. (29) 1942 Lahore 190

TEK CHAND AND BECKETT JJ.

Imam Din — Plaintiff — Petitioner

v.

Allah Rakha and others — Defendants
— Respondents.

Civil Revn. Petn. No. 858 of 1940, Decided on 10th March 1942, case referred to Division Bench by Tek Chand J., D/- 7th July 1941.

* Limitation Act (1908), Art. 158 — Starting point—Essentials for determination of—“Notice of filing” — Mere handing over of award to officer of Court not authorized to file in Judge’s absence is not filing — Notice need not necessarily be in writing.

Under Art. 158, three things are necessary for fixing the starting point of limitation, (1) the award must have been filed (2) in Court, and (3) notice of the filing has been given to the parties. The mere handing over, or deposit, of a document with the reader who has not been authorized to file awards or documents in the absence of the Judge on leave, is not filing it in Court. An award cannot be said to be filed in Court within meaning of Sch. 2, para. 10, Civil P. C., by simply shoving it on the record; it is necessary that it must be placed on the record by order of the presiding officer of the Court, or by an official specially authorized in this behalf. ‘Filing’ a document, in legal parlance, is “placing it in due manner among the records of the Court.” Further, even “filing in Court” is not by itself sufficient. Time begins to run when, after the award has been filed, notice of the filing has been given to the parties: (‘27) 14 A.I.R. 1927 Lah. 273 and (‘33) 20 A.I.R. 1933 Lah. 239, *Disting.*; (‘16) 3 A.I.R. 1916 Lah. 321 and (‘34) 21 A.I.R. 1934 Lah. 622, *Ref.*

[P 191 C 2]

The notice need not be in writing, formally delivered to the parties: it might be given orally if the parties are present in the Court personally or by authorized agent at the time of the filing of the award.

[P 192 C 1]

A. N. Chona — for Petitioner.

Barkat Ali — for Respondents 1 to 3.

ORDER OF REFERENCE

TEK CHAND J. — The plaintiff-appellant instituted a suit for possession by pre-emption of certain land which had been sold by defendants 4 to 6 to defendants 1 to 3. After certain proceedings had been taken in the Court, both parties applied that the suit be referred to the sole arbitration of Chaudhri Mohammad Hussain. The Court granted the application and made a reference to the aforesaid arbitrator on 29th May 1940, directing that the award be filed on 24th June 1940. On that date the arbitrator came to the Court but the presiding officer was absent on casual leave. The arbitrator handed over the award to the reader, who informed the parties that the award had been received and asked them to appear on 28th June when the Judge was expected to be back from leave.

On 28th June 1940 both parties appeared before the Judge who passed an order directing them to “file objections (if any) within the time prescribed

a by law" and fixed the case for hearing on 17th July 1940. The plaintiff filed objections to the award on 6th July 1940. At the hearing it was urged on behalf of the defendant-vendee that the plaintiff's objections were barred by time as they had not been presented within ten days after 24th June 1940, when the award was "filed in Court" by the arbitrator in the presence of the parties and the fact was duly intimated by the reader to them. The plaintiff replied that the handing over of the award by the arbitrator to the reader in the absence of the Judge on leave did not in law amount "to filing the award in Court" and that the period of ten days prescribed under Art. 158, Limitation Act, did not begin to run from that date. It is contended that it was on 28th June 1940 when the presiding officer resumed his duties that the award could be said to have been "filed in Court" and notice of the filing given to the parties.

b The learned Senior Subordinate Judge has accepted the defendant's contention and, being of the view that the objections to the award were out of time, has declined to consider them. He has, accordingly, dismissed the suit in accordance with the award. On revision, it is contended on behalf of the plaintiff-petitioner that in a subordinate Court where there is no official, duly authorized under the law to receive petitions, (as the Deputy Registrar is in the High Court) an award cannot be said to have been "filed in Court" on a day on which the presiding officer is absent. Counsel refers to the wording of Art. 158, Limitation Act, and argues that it contemplates that the filing of the award must be before the presiding officer, as notice of such filing can only be issued by, or under the orders, of the Judge. Mr. Barkat Ali for the respondent, on the other hand, maintains that the mere fact that a Judge suddenly falls ill and is absent or for some other reason proceeds on casual leave, does not mean that the 'Court' is closed on that date, even though the office is open and the establishment is working. He also contends that the filing of the award and issue of notice are merely ministerial acts and can be performed by the office in the absence of the Judge.

c The rulings cited by the lower Court do not appear to be in point. A. I. R. 1927 Lah. 273¹ merely laid down that the provisions of S. 5, Limitation Act, did not apply to an objection-application filed under Art. 158. In A.I.R. 1933 Lah. 239² time for institution of the suit was sought to be extended under S. 4, Limitation Act, because the Judge was absent on leave on the last day when limitation expired. This contention was overruled by Tapp J. in view of the wording of S. 4, and the finding of fact that the extension of time was not claimed bona fide. Reference may also be made to 36 P.L.R. 466,³ where Bhida J. held that the presentation of a plaint to the Naib-Sheriff during the temporary absence of the Judge from the station, where the Naib-Sheriff had not been authorized to receive plaints, was not proper presentation. The question raised is of importance and as the practice of subordinate Courts does not appear to be uniform, it seems necessary to have the matter settled authori-

ritatively by a larger Bench. I accordingly refer the case to a Division Bench. An early date after the vacation shall be fixed.

JUDGMENT OF DIVISION BENCH

TEK CHAND J.—The facts necessary for the determination of the question involved in the case are set out in detail in the referring order, dated 7th July 1941, which should be read as a part of this judgment. Paragraph 10 of Sch. 2, Civil P. C., lays down that "where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, . . . and notice of the filing shall be given to the parties." Article 158, Limitation Act, 9 of 1908 (as amended in 1919) prescribes a period of ten days for making an application under the Civil Procedure Code to set aside an award from the date when the award "is filed in Court and notice of the filing has been given to the parties." The question for determination is whether in the circumstances of this case the terminus a quo for computing the period of ten days prescribed in this Article is 24th June 1940, when the arbitrator handed over the award to the Reader in the absence of the Subordinate Judge on casual leave, or from 28th June 1940 when the Subordinate Judge passed the order directing the parties "to file objections (if any) within the time prescribed by law." The learned Judge has held that the period is to be computed from the former date, but in this conclusion I am unable to agree. Under Art. 158, three things are necessary for fixing the starting point of limitation: (1) the award must have been filed (2) in Court and (3) notice of the filing has been given to the parties.

It is common ground that the Reader of the Subordinate Judge's Court had not been authorized to 'file' awards or similar documents without the orders of the presiding officer. It seems obvious, therefore, that the mere handing over, or deposit, of the document with the Reader in the absence of the Judge on leave, was not filing it in Court. An award cannot be said to be 'filed in Court' within the meaning of Sch. 2 para. 10, Civil P. C., by simply shoving it on the record; it is necessary that it must be placed on the record by order of the presiding officer of the Court, or by an official specially authorised in this behalf. 'Filing' a document, in legal parlance, is "placing it in due manner among the records of the Court" (Murray's Oxford Dictionary). Further, even 'filing in Court' is not by itself sufficient. Time begins to run when, after the award had been filed, notice of the filing had been given to the parties.

In the Limitation Act 10 of 1877 and also in Act 9 of 1908 (as originally enacted) the date from which the period of ten days was to begin under Art. 158 was "when the award is submitted to the Court." This was interpreted by some Courts to mean the date on which the award was received in Court; but other Courts held that in view of the phraseology of S. 516, Civil P. C. of 1882 (= Sch. 2, para. 10 of the Code of 1908) which required the Court to give notice of the filing of the award, time ran from the date of notice. It was the latter view which had prevailed in the Punjab Chief Court. See *inter alia*, 28 I.C. 427⁴ (per Shah Din J.). In 34 I.C. 250=A.I.R. 1916 Lah. 321⁵ Johnstone J. held that "reasonably interpreted the sub-

1. (27) 14 A.I.R. 1927 Lah. 273; 100 I. C. 955; 8 Lah. 274; 28 P. L. R. 441, *Devi Ditta v. Babu Ram*.

2. (83) 20 A.I.R. 1933 Lah. 239; 142 I. C. 307; 34 P. L. R. 338, *Hira Lal v. Sojan Chand*.

3. (34) 21 A. I. R. 1934 Lah. 622; 152 I. C. 618; 36 P. L. R. 466; 15 Lah. 308, *Nur Muhammad v. Ghulamam*.

4. (15) 2 A.I.R. 1915 Lah. 352; 28 I.C. 427; 96 P.L.R. 1915, *Sahib Rai v. Chalt Ram*.

5. (16) 3 A.I.R. 1916 Lah. 321; 34 I. C. 250, *Jawahir Singh v. Mehr Singh*.

a mission to Court (within the meaning of Art. 158) takes place on the date on which the Court is ready to receive the award and on which it had arranged the parties to be present. The mere fact that a scrap of paper was in the hands of the ahlmad . . . is nothing." In order to put the matter beyond doubt Art. 158 was amended in 1919 and it was enacted that the date from which the period of ten days begins to run is "when the award is filed in Court and notice of the filing has been given to the parties." By this amendment the legislature made it clear that 'filing' the award is not equivalent to its 'submission' to the Court, and the terminus quo is the date of service on the parties of the notice of the filing. The notice, of course, need not necessarily be in writing, formally delivered to the parties: it might be given orally if the parties are present in Court personally or by authorised agent at the time of the filing of the award.

In the present case the Judge was on leave on 24th June 1940 when the arbitrator handed over the award to the reader. It was on 28th June, that the Judge resumed his duties and in the presence of counsel for the parties, passed an order directing them to file objections within the time prescribed by law. It is, therefore, the latter date from which the period of ten days prescribed under Art. 158 began to run, and the objections filed by the plaintiff on 6th July were within time. I would accordingly allow this revision petition, set aside the order of the Senior Subordinate Judge and remand the case to him for disposal of the objections filed by the petitioner in accordance with law. Both counsel have been directed to 'cause their clients to appear before the Senior Subordinate Judge Sialkot, on 1st April 1942 when a date for further proceedings will be fixed.

BECKETT J. — I agree.

K.S./R.K.

Petition allowed.

Limitation Act —

(42) Chitaley, Art. 158, N. 4.

(38) Rustomji, Pages 1571-1572, Note "When the award is submitted to the Court."

C. P. C. —

(40) Chitaley, Sch. II, Para. 10, Notes 4 and 5.

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TEK CHAND AND BECKETT JJ.

Udho Das s/o Lal Chand — Defendant
— Appellant

v.

Haji Khair Mohammad, Plaintiff and
others, Defendants — Respondents.

Second Appeal No. 817 of 1940, Decided on 25th February 1942, case referred to Division Bench by Beckett J., D/- 3rd April 1941.

(a) Civil P. C. (1908), O. 21, Rr. 63 and 58—Effect of O. 21, R. 63—Summary decision is conclusive only for purposes of proceedings in which it is given not only as regards outside claimant but also decree-holder.

The effect of O. 21, R. 63 is to render a summary decision conclusive only for the purposes of the proceedings in connexion with which it is given. This interpretation applies not only so far as the interests of an outside claimant are concerned but also where the interests of the decree-holder are concerned. *Case law discussed.* [P 198 O 2]

(b) Civil P. C. (1908), O. 21, R. 63—Suit to set aside decision of executing Court under O. 21, R. 63—Plaintiff must prove his title—In absence of conclusive evidence of title suit must fail.

In a suit to set aside the decision of an executing Court under O. 21, R. 63 it is for the plaintiff to prove his title; and if it is found that there is no conclusive evidence on the question of title the plaintiff's suit must fail. [P 194 C 1]

Q. C. Mital — for Appellant.

Shambu Lal Puri — for Respondents (Khair Mohd. and Khuda Bakhsh).

BECKETT J. — Mohammad Jiwan mortgaged the property in suit with Udho Das for Rs. 400 on 11th December 1930. The property mortgaged consisted of two houses bearing the numbers of 67 and 68 with a frontage of 15 feet in Block 8 of Dera Ghazi Khan. The mortgage was with possession, but on the same day there was executed the usual rent deed by the mortgagor in favour of the mortgagee. On 18th March 1933, Udho Das obtained a decree for the sum of Rs. 132-11-6 as arrears of rent and proceeded to attach the mortgaged property. Khair Mohammad, a son of Mohammad Jiwan and brother of Faiz Mohammad, raised an objection that house No. 67, together with the frontage, was his property. This objection was accepted and the attachment was raised on 18th October 1935.

Udho Das subsequently brought a suit on the mortgage and obtained a preliminary decree on 5th December 1935. Khair Mohammad again filed objections but these were rejected as belated on 21st April 1936. The decree was made final on 21st August 1936, and the decree-holder then proceeded to have the property brought to sale. Khair Mohammad once more objected, but his objections were rejected on 22nd November 1938. Khair Mohammad then brought the present suit for a declaration that the mortgaged property was not liable to sale in execution of the mortgage decree. The Courts below have held that the subject-matter of the dispute has already been finally settled in the course of execution proceedings inasmuch as no suit was brought within a proper time to set aside the earlier decision under O. 21, R. 63, Civil P. C. The result is that Khair Mohammad has been granted a declaration with respect to house No. 67 only, the parties being left to bear their own costs. Udho Das has appealed against this decision. The view taken by the Courts below is based on the wording of R. 58 (1) and R. 63 of O. 21, Civil P. C., which run as follows:

"Rule 58 (1). Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed."

Rule 63. "Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

On behalf of the appellant Mr. Q. C. Mital contends that the effect of R. 63 is only to render the

a decision of the executing Court conclusive for purposes of the decree which is then to be executed; it does not render such decision conclusive for all future purposes, including any proceedings which may be taken by the same decree-holder in execution of a later decree. In support of this contention, he relies upon the decisions in 8 Cal. 279,¹ 13 Bom. 72,² 18 Bom. 241,³ 31 Cal. 228⁴ and A.I.R. 1925 Mad. 1113.⁵ These were all cases in which a claimant had raised unsuccessful objections, but the attachment was either withdrawn or automatically came to an end. It was held that the failure of the claimant to have the decision of the executing Court set aside by means of a regular suit did not prevent him from raising the same objections if his title was again attacked by the same decree-holder by means of an attachment under a later decree. This was accepted as settled law by a Full Bench of the Allahabad High Court in 56 All. 537;⁶ but a distinction was there drawn between an unsuccessful outside claimant and a decree-holder, and it seems to have been considered that the same rule would not apply to a decree-holder against whom an adverse decision of this kind has been given by an executing Court. On behalf of the respondents, Mr. S. L. Puri lays stress on the distinction drawn in this last case, and he also relies upon the decision in 44 Mad. 268,⁷ which appears at first sight to have been based upon a view different from that taken in the decisions mentioned above, even where an outside claimant is concerned.

As pointed out by Sulaiman C. J. in 56 All. 537⁶ (at pp. 541 and 542), the question is to what extent R. 63 renders the summary decision conclusive, and two interpretations are possible: one is that it should be regarded as conclusive between the parties for all purposes and the other is that it should be regarded as conclusive for the purposes of that proceeding, i.e., the proceedings arising out of the attachment. If once it is held to be settled law, as it seems to be, that the section is to be interpreted as meaning that such a decision is not to be taken as conclusive for all purposes so far as the interests of the claimants are concerned, then it is extremely difficult to see how it is possible to import a meaning which would allow any other view to be taken when the interests of a decree-holder are concerned. The main reason given in the two Bombay decisions and the later Calcutta decision was in effect that an unsuccessful claimant had no reason to proceed to a regular suit when an attachment had ceased, and at first sight this reason may not be exactly applicable when a decision is given against the decree-holder; but in any case the real question is whether the wording of R. 63 was ever intended to make the summary decision conclusive

for all purposes between the same parties, and even where a decree-holder is concerned there is no obvious reason why he should be required to bring a regular suit merely for the purpose of protecting his interest in the hypothetical event of his ever obtaining a decree against the same judgment-debtor.

Although at first sight 44 Mad. 268⁷ would appear to be an authority for holding that the summary decision is conclusive for all purposes between the parties, and this is in fact what is given in the head-note, but I think to some extent the case is clearly distinguishable on the actual facts. This was a claimant's suit, brought on a mortgage between the same parties who had previously been concerned, first with execution proceedings in the course of which the claim had been dismissed, and then with different execution proceedings in the course of which the disputed property had been brought to sale. Besides this, there had been an unsuccessful attempt by the plaintiff to enforce his claim by means of a suit. The decision was mainly based upon the right of an auction purchaser to retain possession of the property which he had reason to believe that he had bought free of all encumbrance; and some of the earlier decisions were distinguished on the ground that the dominating fact therein was the release or withdrawal of the attachment. In these circumstances, the decision can hardly be regarded as an authority beyond the facts of the case; and if it is to be held as laying down a general rule, it is clearly opposed to the reasoning in a later decision of the same Court, A.I.R. 1925 Mad. 1113.⁵

In view of the general trend of the decisions, we are of opinion that the effect of O. 21, R. 63, Civil P. C., is to render a summary decision conclusive only for the purposes of the proceedings in connection with which it is given and we are not able to find any valid reason for holding that this interpretation should be applied only so far as the interests of an outside claimant are concerned. This makes it necessary to deal with the present suit on merits. Neither of the Courts below gave any clear decision on the merits, holding this to be unnecessary in view of the finding that the earlier decision of the executing Court was conclusive. The relevant facts are as follows. The property originally belonged to Khair Mohammad and is so shown in the revenue records. The property was then sold in execution of a decree and purchased by Wahid Bakhsh. Udho Das states that Wahid Bakhsh then sold the property to Mohammad Jiwan, who then proceeded to mortgage it. Khair Mohammad, on the other hand, states that he paid off the decretal amount to Wahid Bakhsh and retained possession of the property. Both transactions are said to have been oral, and no change was made in the revenue records. Neither side produced Wahid Bakhsh as a witness and the evidence on both sides was not accepted.

Since the suit is one to set aside the decision of an executing Court under O. 21, R. 63, Civil P. C., it is for the plaintiff to prove his title; and if it is found that there is no conclusive evidence on the question of title the plaintiff's suit must fail. It is contended, however, that the entry in the revenue records is sufficient to turn the scale in favour of the plaintiff and throw the burden of proof upon Udho Das. As pointed out by the trial Court, however, the execution proceedings clearly show that the property was transferred to Wahid Bakhsh and the claim of Khair Mohammad that he paid off the decretal amount before the sale was concluded is clearly false. There was no mutation of the entry in the revenue records in consequence of the transfer

1. ('82) 8 Cal. 279 : 10 C.L.R. 204, Umesh Chunder Roy v. Raj Bulubh Sen.
2. ('89) 13 Bom. 72, Ibrahimbhai v. Kabulabai.
3. ('94) 18 Bom. 241, Gopal Purushotam v. Bai Divali.
4. ('04) 31 Cal. 228, Krishna Prasad Roy v. Bipin Behari Roy.
5. ('25) 12 A.I.R. 1925 Mad. 1113 : 37 I.C. 635 : 48 M.L.J. 616, Kumara Goundan v. Theveraya Reddi.
6. ('34) 21 A.I.R. 1934 All. 267 : 148 I.C. 676 : 56 All. 537 : 1934 A.L.J. 19 (F.B.), Habib Ullah v. Mahmood.
7. ('21) 8 A.I.R. 1921 Mad. 105 : 60 I.C. 760 : 44 Mad. 268 : 40 M.L.J. 7, Singariah Chetti v. Chinnabbi Reddi.

- a of title in favour of Wahid Bakhsh. The revenue entry thus does no more than reflect the previous ownership in favour of Khair Mohammad and adds nothing to the presumption which the law already allows in favour of the continuance of an existing title. When once it has been conclusively proved that this presumption no longer arises (in consequence of the transfer to Wahid Bakhsh) it is for the plaintiff to show that he recovered the ownership of the property from Wahid Bakhsh, and this he has signally failed to do. All that can be certainly said is that the property is last known to have been sold to Wahid Bakhsh, and this is not enough to establish his claim that the property is not now liable to be sold in execution of the mortgage decree obtained by Udho Das against his father. For these reasons the appeal must be accepted. The decree of the trial Court is reversed and the suit is dismissed.
- b In view of the fact that neither party has been held to have substantiated the claim put forward by him and the decision of the case has involved difficult points of law, the parties are left to bear their own costs.

G.N./R.K.

Appeal accepted.

C. P. C. —

- (a) ('40) Chitaley, O. 21, R. 63, Notes 2 and 16.
(41) Mulla, Page 848, Note "Subject to the . . . be conclusive."
(b) ('40) Chitaley, O. 21 R. 63, N. 7.
(41) Mulla, Page 847, Note "Scope of suit under this rule."

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FULL BENCH**

**TEK CHAND, DALIP SINGH AND
MONROE JJ.**

Malawa Mal—Plaintiff—Appellant

v.

*Punjab Provincial Government through
Collector, Gurdaspur, and another —
Defendants — Respondents.*

Letters Patent Appeal No. 164 of 1939, Decided on 20th May 1942, against decree of Bhide J., Reported in ('39) 26 A.I.R. 1939 Lah. 526.

(a) Punjab Alienation of Land Act (13 of 1900 as amended by Act 10 of 1938), S. 2 (8)—S. 2 (8) is not retrospective (Per *Full Bench*).

Section 2 (8) not being retrospective in effect can at best only affect transactions taking place after it came into force. [P 196 C 2]

(b) Punjab Alienation of Land Act (13 of 1900 before amendment by Act 10 of 1938), Ss. 3, 14 and 19—Deputy Commissioner's sanction under S. 3 is final—No appeal or revision lies (Per *Full Bench*): 41 P. L. R. 467=('39) 26 A. I. R. 1939 Lah. 526=186 I. C. 332, *REVERSED*.

The grant of sanction to a member of an agricultural tribe under S. 3 is within the absolute discretion of the Deputy Commissioner and there is nothing in S. 3 to indicate that his discretion, once exercised can be interfered with by any other authority. On the other hand, the plain wording of S. 3 indicates that as soon as sanction is granted the permanent alienation "takes effect as such" in other words, there is a valid transfer of ownership from the alienor to the alienee. Both *a priori* and on a strict interpretation of the words of the Statute (Ss. 3, 14 and 19) as they stood before the Amending

Act, 10 of 1938, the Legislature did not contemplate that there should be any appeal or revision from the sanction given by the Deputy Commissioner to a contemplated or completed alienation. The provisions of the Punjab Land Revenue Act relating to appeals and revisions are not applicable to a sanction given under S. 3, Punjab Alienation of Land Act. Consequently, where a Deputy Commissioner had given sanction to a member of an agricultural tribe to make a permanent alienation of his land to a person who is not a member of the same tribe or of a tribe in the same group, and in pursuance of the sanction so given a sale has been effected, the Financial Commissioner has no authority, *suo motu* or on being moved by the vendor or other person to revoke the sanction: 41 P. L. R. 467=('39) 26 A. I. R. 1939 Lah. 526=186 I. C. 332, *REVERSED*. [P 197 C 1,2; P 199 C 1; P 200 C 1]

(c) Punjab Alienation of Land Act (13 of 1900 as amended by Act 10 of 1938), S. 2 (8)—S. 2 (8) is not in itself sufficient to give right of appeal against orders of Deputy Commissioner passed under Act (*Obiter*) (Per *Dalip Singh J.*).

The amendments introduced in the Punjab Alienation of Land Act by Act 10 of 1938 show that the Legislature did not think that S. 2 (8) was sufficient by itself to give a right of appeal against the orders of the Deputy Commissioner under any of the provisions of the Punjab Alienation of Land Act. [P 197 C 1]

(d) Punjab Alienation of Land Act (13 of 1900), Ss. 14 and 3 — Deputy Commissioner's sanction under S. 3 given — S. 14 cannot apply (Per *Monroe and Tek Chand JJ.*).

Section 14 takes effect only until the Deputy Commissioner's sanction under S. 3 is given or has been refused. Section 14 can therefore have no operation in a case in which the Deputy Commissioner's sanction under S. 3 has been given. [P 198 C 2]

(e) Punjab Alienation of Land Act (13 of 1900), S. 3—Instructions by Financial Commissioners to Deputy Commissioners contained in para. 37, Douie's Land Administration Manual relating to sanction under S. 3 are departmental — Non-compliance cannot render sanction under S. 3 invalid (Per *Tek Chand J.*).

The instructions in para. 37 of Douie's Land Administration Manual issued by the Financial Commissioners with the approval of the Provincial Government, to the Deputy Commissioners as to the considerations which should influence them in giving or withholding sanction under S. 3 are instructions of a departmental nature, non-compliance with which cannot render the sanction invalid in law or have the effect of annulling the sale which was completed in consequence thereof. [P 200 C 1,2]

Qabul Chand — for Appellant.

Indar Dev Dua for Advocate-General —
for Respondents (Punjab Government).

DALIP SINGH J.—One Indar, an agriculturist, applied for sanction to sell a portion of his land to a non-agriculturist, Malawa Mal, under S. 3, Land Alienation Act. On 18th July 1934 the sanction was granted by the Deputy Commissioner and is Ex. P4. The deed was registered and possession was delivered. Mutation followed on 28th May 1935. The sale was for Rs. 1788. It is unnecessary to enter into the details of the consideration which, however, is not disputed to have passed. On 9th December

1936, the Financial Commissioner cancelled the sale in toto, suo motu. Malawa Mal then brought the present suit to declare that this act of the Financial Commissioner was ultra vires, inasmuch as the action of the Deputy Commissioner granting sanction was final and could not be revised or revoked by the Financial Commissioner. The suit was dismissed by the trial Court and the appeal was dismissed by the learned District Judge. A second appeal to this Court was partially accepted by a learned Judge in Single Bench, who held that the sale could not be cancelled in toto but under S. 14, Land Alienation Act, it was for the Deputy Commissioner to determine how far the sale could take effect as a mortgage. For the rest, the appeal was dismissed. A Letters Patent appeal was filed and by my referring order, dated 18th April 1940, the case was referred to a Full Bench in view of the difficulties involved in the interpretation of the Act.

On the question whether appeal or revision did or did not lie to the Financial Commissioner from the sanction given by the Deputy Commissioner, there is no ruling of this Court to which our attention has been drawn. But there are various rulings of the Financial Commissioners to which reference should be made. In 4 P. R. 1908¹ Mr. Wilson, Financial Commissioner, appears to have held that both appeal to the Commissioner and revision to the Financial Commissioner lay. In 12 L. L. T. 66² it was held by Mr. Miles Irving that there was no appeal by a third party to the Commissioner but that revision lay. In 13 L. L. T. 29,³ Mr. Miles Irving, the Financial Commissioner, held that no appeal lay by the would-be vendee to the Commissioner but that revision lay to the Financial Commissioner. In 13 L. L. T. 57,⁴ revision was exercised by the Financial Commissioner; there was no appeal to the Commissioner at all. In 14 L. L. T. 11⁵ and in the same volume at pp. 26⁶ and 29⁷ and at p. 1,⁸ there was no appeal, it appears, to the Commissioner but it was assumed that appeal might in a proper case lie to the Commissioner but certainly the Financial Commissioner had power to revise. In 15 L. L. T. 3,⁹ Mr. Abdul Aziz, Financial Commissioner, held that no appeal lay by the would-be vendee to the Commissioner but the Financial Commissioner had the power to revise. In 15 L. L. T. 11¹⁰ and p. 381¹¹ and again, in 20 L. L. T. 19,¹² it was held without discussion that the Financial Commissioner had authority to revise presumably under the powers conferred by S. 16, Land Revenue Act. In 20 L. L. T. 43,¹³ appeal was held to lie under S. 9, Land Alienation Act, from an order of the Deputy Commissioner.

It is contended on behalf of the respondent that

1. ('08) 4 P. R. 1908: 91 P.L.R. 1908: 14 P. W. R. 1908, *Devi Dial v. Ahmad Khan*.
2. ('33) 12 L. L. T. 66, *Jalal Din v. Muhammad*.
3. ('34) 13 L. L. T. 29, *Tara Singh v. Fazlan*.
4. ('34) 13 L. L. T. 57, *Crown v. Fateh Mohammad*.
5. ('35) 14 L. L. T. 11, *Crown v. N. B.*
6. ('35) 14 L. L. T. 26, *Malika Mohammad Din v. Gyan Singh*.
7. ('35) 14 L. L. T. 29, *Crown v. Jhanda*.
8. ('35) 14 L. L. T. 1, *Crown v. Ganga Ram*.
9. ('36) 15 L. L. T. 3, *Crown v. Budhi Parkash*.
10. ('36) 15 L. L. T. 1, *Crown v. Ghazi Mahomad*.
11. ('36) 15 L. L. T. 28, *Crown v. Mohammad Nawaz Khan*.
12. ('41) 20 L. L. T. 19, *Fatta v. Bhikam Sain*.
13. ('41) 20 L. L. T. 43, *Himmat Ali v. Bhag Mal*.

the Financial Commissioners may have differed on the question as to who had the right of appeal to the Commissioner but at no time had any Financial Commissioner held that no appeal lay to the Commissioner and all have unanimously held that the power of revision did exist in the Financial Commissioner and this would only exist by applying the provisions of the Land Revenue Act; in other words, treating the orders of the Deputy Commissioner as orders of a revenue officer, to which under S. 19 the provisions of the Land Revenue Act, re-appeal and revision would apply. As regards S. 23, Land Revenue Act, it was contended on the one hand by counsel for the appellant that the Government might appoint some person who was not a revenue officer at all to perform the duties prescribed by the Land Alienation Act as falling on the Deputy Commissioner. On the other hand, it was contended by the learned counsel for the respondent that the fact that officers of a higher rank than a Deputy Commissioner could exercise the powers of a Deputy Commissioner under the Land Alienation Act, pointed to the recognition by the Legislature of the fact that the Deputy Commissioner was a revenue officer when exercising powers under the Land Alienation Act. Stress was also laid by both sides on recent amendments of the Land Alienation Act. The learned counsel for the respondent relied on S. 2 (8) of the Act, as put in by Punjab Act 10 of 1938. This sub-section reads as follows:

"Deputy Commissioner" shall be deemed to be a revenue officer within the meaning of Ss. 19, 20 and 21 of this Act, and shall include any officer specially appointed by the Provincial Government to perform the duties of a Deputy Commissioner for the purposes of sub-ss. (2) and (3) of S. 4, S. 13A, S. 13B and S. 13C of this Act:

Provided that the Provincial Government shall not appoint for this purpose an officer below the rank of an Assistant Collector, first grade."

On the one hand, it was urged by the learned counsel for the respondent that clearly the term "Deputy Commissioner," when used in this Act, implies a revenue officer by virtue of this definition. On the other hand, it was contended by the learned counsel for the appellant that if by means of this section the orders of the Deputy Commissioner under S. 3, Land Alienation Act, were held subject to appeal to the Commissioner and revision by the Financial Commissioner, then the orders of an officer specially appointed by the Provincial Government under the same section would not be subject either to appeal to the Commissioner or revision by the Financial Commissioner, though it was obvious that such officer might be only of the rank of an Assistant Collector, first grade; presumably therefore a lower rank than that of the Deputy Commissioner. Certainly it appears to me that this would be an extraordinary anomaly that the Legislature contemplated appeals and revisions from the order of a Deputy Commissioner granting sanction under S. 3, but did not contemplate either appeal or revision from the order of an officer specially appointed by the Provincial Government. Again it was pointed out that there were specific provisions made under S. 3C for appeals from the order of the Deputy Commissioner under Ss. 3A and 3B. No such provision was made for orders under S. 3. Similarly special provisions for appeal and revision were made under Ss. 13B and 13C from the orders of a Deputy Commissioner under S. 4 or S. 13A, but again no provision was made for appeal from an order under S. 3. The learned counsel for the respondent, how-

a ever, contended that the reason for the special provision for appeal was that whereas the appeals under the Land Revenue Act had a different limitation, the limitation for appeal under S. 3C was cut down to 30 days; hence the need for a special provision. Similarly, he contended that under section 13B appeal was also given from an order passed on review by a Deputy Commissioner and that for the limitation for appeal the provisions of Ss. 5 and 12, Limitation Act, were made applicable to it: hence again, according to him, the need for special provision for appeal under this section. On the other hand, it was pointed out by the learned counsel for the appellant that if this were the case and the rights of appeal and revision that would anyhow have attached to the Deputy Commissioner's orders under the provisions of the Land Revenue Act were being modified, one would have expected to see some such words as "notwithstanding the provisions of the Land Revenue Act" or words to that effect. No such words existed.

b Again, viewing the matter from a different standpoint, it was contended on one side that if the Legislature intended that the orders of a Deputy Commissioner under S. 3 were subject to appeal or revision, then after the words "sanction has been refused," words like "or has been revoked or has been set aside in appeal or revision by competent authority" should have figured in S. 14. No such words, however, appear there at all. It was also strongly contended by the learned counsel for the appellant that the Legislature could not have contemplated that the revisionary powers given to the Financial Commissioner, to which there is no limitation attached, should be exercised ten years or more after sanction had been given by the Deputy Commissioner and alienations had taken place in accordance therewith. Such a disturbance of title could not have been contemplated by the Legislature and if contemplated, would have had suitable words such as described above, showing that the Legislature did contemplate such disturbance. On the other hand, S. 14, as it stands, merely provides that a permanent alienation shall not take effect as such until the sanction of a Deputy Commissioner is given thereto. It would follow from this that the Legislature contemplated that once that sanction had been given, a permanent alienation would take effect. If this were not so, there would be specific words to show that a permanent alienation would be avoided or rendered of no effect by any subsequent actions taken either by the Commissioner or by the Financial Commissioner. No such words occur. Again, on the other hand, it was strongly contended by the learned counsel for the respondent that if any permanent alienation was not to take effect until the sanction of a Deputy Commissioner was given thereto, then if that sanction could be revoked by the Deputy Commissioner himself or by the Commissioner or the Financial Commissioner, then the moment such revocation or cancellation took place by competent authority, the sanction once given must in the eye of the law be presumed never to have been given at all, and, therefore, the alienation ceased to be a permanent alienation and took effect as a usufructuary mortgage, as provided by S. 14.

c There is considerable force in the objections which have been stated on the one side or the other. It appears to me that it may be accepted that, though the Financial Commissioners have differed as to who had a right of appeal to the Commissioner, no Financial Commissioner has ever held that no one at all had a right of appeal to the Commissioner

d from the order of the Deputy Commissioner under S. 3 and no Financial Commissioner at any time has doubted his own powers to revise the orders of the Deputy Commissioner. Many of the rulings cited, however, have been merely cases where without considering the difficulty at all the Financial Commissioners have assumed that power to appeal and power to revise lay in the Commissioner or the Financial Commissioner. When the question has really been considered, the decisions of the Financial Commissioners certainly might be reconciled on the ground that at any rate they all considered the orders of the Deputy Commissioners to be those of a revenue officer, though not necessarily those of a Collector. At the same time, it is difficult to see how a vendee or would-be vendee could be considered not to be a party who had the right of appeal. In 11 L. L. T. 97,¹⁴ Mr. Miles Irving appeared to think that there was a distinction between the orders of a Deputy Commissioner under the Land Alienation Act and the orders of a Collector under the Land Revenue Act; but the logical consequences of holding any such opinion appear never to have been discussed by any of the learned Financial Commissioners dealing with the matter.

e So far as the recent legislation goes, I have already pointed out the anomaly arising under the provisions of S. 2 (8), but, in any event, it seems to me that this section not being retrospective in effect, could at best only affect transactions after it came into force. In the present case the sanction was given in 1934, the cancellation took place in 1936 and therefore, the definition of "Deputy Commissioner" in the present Act can throw no light on what the situation was before the amending Act, 10 of 1933 was passed. For the future this definition might create difficulties; but I do not think it is necessary to decide this point for the purposes of the present case. In my judgment, there is great force in the contention that S. 14 contains no such words as "or if the sanction had been revoked or set aside in appeal or revision by competent authority." This clearly, to my mind, shows that the Legislature did not contemplate that the sanction of the Deputy Commissioner could affect the validity of the alienation because subsequent to the alienation having been completed that sanction had been revoked either by the Deputy Commissioner or cancelled by superior authority. If the Legislature had contemplated any such peculiar result nothing was easier than to insert such words in the section. No difficulty could then have arisen. After all the sanction of the Deputy Commissioner could be given in two classes of cases. The first is where the vendor and vendee had not completed the alienation but both were in agreement to sell and to buy the land. In such a case, it would be the business of the Deputy Commissioner to see that the policy of the Government was carried out and that alienations were not sanctioned which contravened this policy. It would be perfectly easy if the Government felt that Deputy Commissioners were not the proper persons to interpret that policy to issue instructions that Deputy Commissioners before giving sanction should always refer to the contemplated sanction together with their opinion thereon to the Commissioner and that the Commissioner should send that contemplated sanction to the Financial Commissioner with his opinion thereon and that the Financial Commissioner should then decide whether the Deputy Commissioner should give sanction or not. This class of case could easily,

a therefore, be met by provisions similar to what I have suggested above.

Then comes the case where the vendor has agreed to sell, the sale is not completed but the vendor wishes to resile and the vendee wishes to enforce the agreement. It would then again be for the Deputy Commissioner to see whether the vendor should or should not be kept to his bargain and the vendee given the right to proceed in the civil Courts to enforce his remedy, if any, by the Deputy Commissioner stating whether in his opinion the proposed alienation traversed or did not traverse the policy of the State. Here again, instructions could easily be issued whereby the Deputy Commissioner should be forced to refer all such contemplated alienations to the Commissioner and Financial Commissioner so as to take their opinion before proceeding to give his sanction to the contemplated alienation. b No difficulty therefore could possibly arise as regards the policy of the State being contravened by Deputy Commissioners not fully realizing the implications or the desiderata of that policy. In the case, where the alienation has actually been completed either immediately before, or immediately after, the sanction given by the Deputy Commissioner, it seems to me monstrous to think that the Legislature contemplated disturbance of titles so effected by actions suo motu on the part even of such important officials as Financial Commissioners years after the event. The hardship and injustice worked by any such idea or such legislation would, so far as I am concerned, be difficult to conceive as attaching to the intention of the Legislature. Therefore, unless clear words exist to that effect—and far from existing, their absence seems to me to be pronounced— c the Legislature in this class of case obviously contemplated that the sanction of the Deputy Commissioner should be final. Here again, if the State wished to secure that officials higher than the Deputy Commissioners should consider whether any completed alienation should or should not be allowed to take due effect, it would be perfectly easy to make a rule that all such matters should be referred by the Deputy Commissioner to the Commissioner and then to the Financial Commissioner before the Deputy Commissioner gave his sanction. But it seems to me that the Legislature could never have contemplated that after sanction had been given and persons had parted with valuable consideration for obtaining property and had themselves possibly alienated the land further, or developed or improved it, believing that they were the owners the sanction of the Deputy Commissioner should be set aside by d the Financial Commissioner.

It seems to me, therefore, that both *a priori* and on a strict interpretation of the words of the statute as they stood before the recent amendments, the Legislature did not contemplate that there should be any appeal or revision from the sanction given by the Deputy Commissioner to a contemplated or completed alienation. What the effect of S. 2 (8) may be on future transactions and what light is thrown by the fact that the Legislature has made special provisions for appeal under sub-ss. (2) and (3) of S. 4 and under Ss. 13A and 13B is also a matter that need not now be discussed. So far as these recent amendments go, it would at least show that the Legislature did not think that S. 2 (8) was sufficient by itself to give a right of appeal against the orders of the Deputy Commissioner under any of the provisions of the Land Alienation Act. If they had thought that all these orders by virtue of the provisions of S. 2 (8) fell within the right of appeal given by Ss. 14 and 16, Land Revenue Act, then if they

intended to cut down those rights of appeal and revision in any way, they would have used words like "notwithstanding anything contained in the Land Revenue Act," or in specific sections of the Land Revenue Act. Whatever therefore might have been the meaning of the Legislature in enacting these specific rights of appeal, I do not think that it necessarily follows that because of the provisions of S. 2 (8), for the future all orders of a Deputy Commissioner even under S. 3, Land Alienation Act, are subject to appeal and revision; but as I stated in the beginning it is unnecessary to decide this point. The provisions, it may however be pointed out, of S. 19 do not make the provisions of the Land Revenue Act apply without qualification. They are only to be applied "so far as they are applicable," and it might well be that certain orders of the Deputy Commissioner under the Land Alienation Act may become appealable by virtue of the provisions of the Land Revenue Act and certain other orders might for inherent reasons make the application of the Land Revenue Act provisions inapplicable to such orders. It is unnecessary however to discuss this question further. In the circumstances, I would accept this appeal and declare that the order of the Financial Commissioner cancelling the sanction given by the Deputy Commissioner to the alienation by Indar in favour of Malawa Mal was ultra vires and the alienation is not affected thereby. The alienation therefore remains operative as given in the registered deed. I would leave the parties to bear their own costs throughout.

MONROE J.—This case has been referred to a Full Bench for the determination of the question "whether the Legislature contemplated that sanctions given by the Deputy Commissioner under S. 3, Punjab Alienation of Land Act, are, or are not, subject to appeal or revision or both by the Commissioner and the Financial Commissioner." On 18th January 1938 the suit in which this question has arisen was instituted in the Court of Lala Pitam Singh Subordinate Judge First Class Gurdaspur to obtain a declaration that the plaintiff was the lawful owner in possession of certain land described in the plaint and that the order of the Financial Commissioners, Lahore, dated 9th December 1936, by which order the mutation of sale of the suit land in favour of the plaintiff was cancelled was illegal, inoperative and liable to be cancelled. The Punjab Provincial Government and Indar, the plaintiff's vendor were made defendants. The facts of the case are simple and have at no time been in dispute. On 18th July 1934 the Deputy Commissioner, Gurdaspur, granted sanction to Indar, a Jat statutory agriculturist, for the sale of the land in suit to the plaintiff, a non-agriculturist. The sale was afterwards completed by a deed, which was executed and registered on 25th October 1934. On 9th December 1936, the Financial Commissioner purporting to act in the exercise of his revisional jurisdiction sent for the record of the case suo motu and made the following order :

"Parties have appeared before me in person, and I have heard what they had to say. The vendor wishes to cancel the sale altogether. He says that he received only Rs. 400 instead of Rs. 790 in cash and was not able to get married in consequence. He also says that the vendee bought all his good land and left him the worst portions only. Vendee denies these allegations, but I am, nevertheless, satisfied that the vendor has a reasonable grievance. I accordingly go even further than the Commissioner's recommendation and direct that the sale be cancelled altogether."

The purpose of the suit was to have this order declared to be of no effect, on the ground that the Financial Commissioner had not jurisdiction in revision to annul the sanction which had been given by the Deputy Commissioner. The learned trial Judge, holding that when the sanction of the Deputy Commissioner had been cancelled, the transaction, although a completed one, contravened the Punjab Alienation of Land Act and dismissed the suit. On appeal, this decision was upheld by the Senior Subordinate Judge. The plaintiff appealed to this Court. Bhide J., who heard the appeal, upheld the view that the Financial Commissioner had power to set aside in revision the order granting sanction to the sale. He held, however, that the Financial Commissioner could not cancel the sale, that his order must be construed as revoking the sanction granted by the Deputy Commissioner and that in the absence of the necessary sanction the sale would take effect as a mortgage according to the provisions of S. 14, Punjab Alienation of Land Act; and he allowed the appeal to this extent and granted the plaintiff a decree declaring that the sale in his favour should take effect as a usufructuary mortgage according to the provisions of S. 14, Alienation of Land Act, owing to the revocation of the sanction granted by the Deputy Commissioner under S. 3 of the Act. The plaintiff obtained a certificate and appealed under the Letters Patent: the appeal came before my learned brethren, who framed, as I have already stated, the question of law for determination. The object of S. 3, Alienation of Land Act, was to prohibit in certain cases permanent alienations of land. The first sub-section gives liberty to alienate land in certain cases: sub-s. (2) enacts that "except in the cases provided for in sub-s. (1), a permanent alienation of land shall not take effect as such, unless and until sanction is given thereto by a Deputy Commissioner." There follows a proviso that sanction may be given after the act of alienation is otherwise completed and that in two special cases sanction shall be unnecessary: sub-s. (3) provides that the Deputy Commissioner shall inquire into the circumstances of the alienation and shall have discretion to grant or refuse the sanction required by sub-s. (2). Section 19 of the Act is as follows:

"Subject to the provisions of this Act, the provisions of Ch. 2, Punjab Land Revenue Act, 1887, shall, in so far as they are applicable, apply to the proceedings of revenue officers under this Act."

The provisions of the Land Revenue Act relating to appeals and revisions are incorporated but only "so far as they are applicable." It is unnecessary here to discuss the arguments on other points, which have been fully considered in the judgment of Dalip Singh J. I confine myself to the question whether the provisions of the Land Revenue Act which provide for revision are capable of being applied in the circumstances of such a case as the present. It seems to me that these provisions cannot be applied. In the transaction under consideration there were two separate acts in the law—the consent and the sale. The result is a transfer of property; which has lawfully taken place and is complete. A transfer of property may be set aside only on certain well-defined grounds. If such a transfer is to be set aside or its effect altered (as for example by conversion of a sale into a mortgage), proceedings must be taken in a Court which has jurisdiction to set it aside or order the alteration. If a Financial Commissioner makes an order annulling a consent given by a Deputy Commissioner, what is the effect? He can do no more than revoke the consent: he has no power to set aside the transfer of property which

has taken place, no power to declare the conveyance void. A declaration that the consent was annulled would, therefore, have no effect. This seems to have been understood by the learned Financial Commissioner, who set aside the consent, in this case, for he also declared the sale a nullity. Bhide J. held that the second part of the order was clearly unsustainable: and he applied S. 14, Alienation of Land Act. This section can have no operation in the present case for it takes effect only "until such sanction is given" or "if such sanction has been refused," the sanction being defined to be the sanction of the Deputy Commissioner. For the reasons given by Dalip Singh J. and because I think that the provisions relating to revision in the Land Revenue Act are inapplicable, I concur in the answer proposed.

TEK CHAND J.—I have had the advantage of reading the judgments of my learned brethren Dalip Singh and Monroe J. and agree with the conclusion reached by them. The facts are few and simple. The land in question belonged to defendant 2, who is a member of a notified agricultural tribe in Gurdaspur District. He applied to the Deputy Commissioner for sanction to sell the land to a non-agriculturist and on 18th July 1934, the Deputy Commissioner granted the sanction under S. 3 (2), Punjab Alienation of Land Act. On 25th October 1934, defendant 2 executed a sale-deed in favour of the plaintiff, who is a non-agriculturist, and the deed was duly registered. A part of the consideration was paid to the vendor (defendant 2) before the Sub-Registrar and the remainder was left with the vendee (plaintiff) for payment to prior creditors of the vendor, one of whom was the mortgagee in actual possession of the land. The plaintiff duly paid the creditors, including the mortgagee, who, on receipt of the mortgage-money, delivered possession of the land to the plaintiff. The revenue authorities sanctioned mutation of the sale in favour of the plaintiff on 28th May 1935. On 9th December 1936, more than two years after the sale, the Financial Commissioner suo motu passed an order cancelling the sale. This order purported to have been made in the exercise of the Financial Commissioner's revisional jurisdiction.

In February 1938, the plaintiff instituted a suit in the civil Court for a declaration that he was the rightful owner of the land and that the order of the Financial Commissioner cancelling the sale was ultra vires and not warranted by law. The suit was dismissed by the trial Judge and his decision was affirmed on appeal by the Senior Subordinate Judge. On second appeal Bhide J., sitting in Single Bench, held that the Financial Commissioner had the power to revoke the sanction granted by the Deputy Commissioner, but this could not have the effect of cancelling the sale which would take effect as a usufructuary mortgage according to the provisions of S. 14, Punjab Alienation of Land Act. He accordingly modified the decree of the Courts below and granted the plaintiff a declaration to the above effect. On a certificate granted by the learned Judge, the present appeal was preferred under Clause 10 Letters Patent, and it came up for hearing before a Division Bench, who, in view of the importance of the question involved, has referred it to a Full Bench. The question for determination may be stated as follows: "Where a Deputy Commissioner had given sanction to a member of an agricultural tribe to make a permanent alienation of his land to a person who is not a member of the same tribe or of a tribe in the same group, and in pursuance of the sanction so given a sale had been effected, has

a the Financial Commissioner authority, suo motu, or on being moved by the vendor or other person, to revoke the sanction and, if so, what is the effect of the cancellation of the sanction on the sale?"

There is no decision of the Punjab Chief Court or the High Court bearing on the point. The question appears to have been raised incidentally before the Chief Court in 31 P. R. 1912¹⁵ (at p. 109) but the learned Judges, Robertson and Rattigan, declined to express any opinion on it. The Financial Commissioners, however, have assumed revisional powers for a long time and in the last few years they appear to have exercised these freely. In none of their judgments, however, has the legal aspect of the question been examined in any detail and, if I may say so with all respect, it is not always easy to reconcile their reasoning or ultimate conclusion. In some cases it has been held that the order of the Deputy Commissioner granting or refusing sanction, is open to appeal to the Commissioner and revision to the Financial Commissioner; in others, it has been laid down that no appeal lies to the Commissioner but the Financial Commissioners have the power to interfere on revision. In some, again it has been assumed that the would-be vendee has no locus standi to apply for revision; in others revisions have been entertained. Lately, in a number of cases, the Financial Commissioners have acted suo motu and revoked sanctions which had been granted several years before.

The present appears to be the first case in which the authority of the Financial Commissioners to revoke a sanction granted by the Deputy Commissioner and cancel sales effected thereunder has been questioned in a civil Court. To this suit the Provincial Government has been made a party and it has supported the action of the Financial Commissioners. The provisions of the law relating to permanent alienations of land are contained in Ss. 3 and 14, Punjab Alienation of Land Act. In sub-ss. (1) and (2) of S. 3, it is laid down that a permanent alienation of his land by a member of an agricultural tribe to a person who is not a member of the same tribe or of a tribe in the same group shall not take effect as such unless and until sanction is given thereto by a Deputy Commissioner; and it is provided that such sanction may be given after the act of alienation is otherwise completed. Sub-section (3) of the same section says that "the Deputy Commissioner shall enquire into the circumstances of the alienation and shall have discretion to grant or refuse the sanction required by sub-s. (2)."

d It would be seen, that the grant of sanction to a member of an agricultural tribe is within the absolute discretion of the Deputy Commissioner and there is nothing in this section to indicate that his discretion, once exercised, can be interfered with by any other authority. On the other hand, it would appear from the plain wording of the section, that as soon as sanction is granted the permanent alienation "takes effect as such," in other words, there is a valid transfer of ownership from the alienor to the alienee. Section 14 says that "any permanent alienation, which under S. 3 is not to take effect as such until the sanction of a Deputy Commissioner is given thereto, shall take effect as a usufructuary mortgage" as described in S. 6 (a) for a period to be fixed by the Deputy Commissioner. Obviously, this section does not deal with a case like the present. Nor does it contain any indication that it was within the contemplation of the Legislature that sanction

once given could be cancelled later. If it was intended that an order granting sanction could be revoked or reviewed subsequently by the Deputy Commissioner himself or on appeal or revision by a higher authority, it is reasonable to expect that a provision to this effect would have been made expressly in S. 3, S. 14 or any other part of the Act, and it would also have been made clear what the consequences of such revocation would be on the title which had validly passed to the vendee as soon as sanction has been given by the Deputy Commissioner.

Reliance is however placed on S. 19 of the Act as containing a statutory provision, which allows appeals to, and revision by, the Commissioner or the Financial Commissioner from orders passed by the Deputy Commissioner under the Act, including orders granting or refusing to grant sanction under S. 3. Section 19 lays down that "subject to the provisions of this Act, the provisions of Chap. 2, Punjab Land Revenue Act, 1887, shall, in so far as they are applicable, apply to the proceedings of revenue officers under this Act." In S. 6, Land Revenue Act, which appears in Chap. 2, the various classes of revenue officers are enumerated: one of these is the Collector. In sub-s. (2) it is stated that "the Deputy Commissioner of the district shall be the Collector thereof." In S. 13 it is provided that an appeal shall lie from the order of a Collector to the Commissioner, and S. 15 authorises the Financial Commissioner to call for the record of any case pending before, or disposed of by any revenue officer. From these provisions, it is sought to be inferred that the Deputy Commissioner while acting under the Alienation of Land Act is a "revenue officer" and as such any order passed by him under the Act is subject to appeal or revision by the Commissioner or the Financial Commissioner. With great respect, this does not seem to follow from the provisions above-mentioned.

In the first place, if it was the intention of the Legislature that the Deputy Commissioner while acting in all matters under the Alienation of Land Act, was to be taken as acting as the Collector, so as to make the provision of the Land Revenue Act relating to appeals, revisions, etc., automatically applicable to orders passed by him under the Alienation of Land Act, there seems to be no reason why the officer, who is to exercise authority under the Act, should have been called the "Deputy Commissioner" and not the "Collector". That this was not the intention however appears clear from S. 23 of the Act, which says that "the powers conferred by this Act upon a Deputy Commissioner may be exercised by a revenue officer of higher rank, or by any officer authorised by the Provincial Government in this behalf." Now, if an officer other than a Deputy Commissioner or a revenue officer of higher rank, is so invested with the powers of a Deputy Commissioner under this Act and passes an order granting or refusing sanction, under S. 3, these orders not being the orders of a "revenue officer" would not be subject to appeal or revision by the Commissioner or the Financial Commissioner. We thus have the highly anomalous position that if the order had been passed by the Deputy Commissioner or other revenue officer invested with powers under the Act it would not be final; but if it had been passed by an officer who was not the Deputy Commissioner or a revenue officer of higher rank, the order passed by him would be final. It is difficult to imagine that this extraordinary result would have been intended and yet this is so if the argument put forward on behalf of the respondent is accepted.

As has been pointed out above, appeals and revisions lie against decisions of the "Collector," not the "Deputy Commissioner" and though by the provisions of S. 6 (2), Land Revenue Act, the "Deputy Commissioner" of a district is the "Collector" thereof, yet the revenue officers, as described in S. 6 (1), include not "the Deputy Commissioner" but "the Collector". It follows therefore that when a power is given to the "Deputy Commissioner" and he exercises that power as such, a general limitation of his power and authority in his capacity of "Collector" is inapplicable to his power as "Deputy Commissioner". This finds support from the addition made to the Act by (Punjab) Act 10 of 1938, which came into force several years after the transaction under consideration, and more than two years later than the order of the Financial Commissioners. By this Act, a new sub-s. (8) was added to S. 2 which provides that the "Deputy Commissioner" shall be deemed to be a revenue officer with the meaning of Ss. 19, 20 and 21 of this Act. From this it is clear that the Legislature did not consider that S. 19 of the Act made the terms "Deputy Commissioner" and "Collector" synonymous for all purposes and in consequence conferred a right of appeal against, and the power of revision of orders passed by the "Deputy Commissioner" as such. By the other amendments made in 1938, express provision was made for appeal from orders passed by the Deputy Commissioner under the amended S. 4 and S. 13A. These provisions would have been entirely superfluous, if the proper construction of S. 19 was that all orders passed by the Deputy Commissioner under the Act were to be deemed to be passed by him as Collector and therefore automatically appealable under the Land Revenue Act. It is necessary to bear in mind the words in S. 19 "in so far as they are applicable." It seems to me that the provisions relating to appeals and revisions are not applicable to a sanction given under S. 3.

To sum up, there is nothing in that section to suggest that the sanction once given may be taken away: the sanction is not a sanction to continue doing something; and it seems that the sanction being in existence at the time of alienation (as in the present case), the terms of the section show that the permanent alienation takes effect on the performance of such formalities as the law may require for it, once and for all. The existence of the sanction at the time of the alienation is sufficient to allow the normal effect in law to be given to the transaction. As stated above, if it had been the intention of the Legislature to allow the discretion of the Deputy Commissioner to be over-riden by higher authority, it would not have been sufficient merely to provide for an appeal, or revision of the order of sanction, but it would have been necessary also to make clear the effect of an order annulling the sanction on an alienation, which had been validly made and had taken effect, while the sanction was in existence.

It may be mentioned that in the course of the arguments counsel for the respondent referred us to para. 37 of Donie's Land Administration Manual which contains instructions, issued by the Financial Commissioners with the approval of the Provincial Government, to the Deputy Commissioners as to the considerations which should influence them in giving or withholding sanction and it was urged that if in any case these instructions have not been followed it is open to the Financial Commissioners to revise the order of the Deputy Commissioner. These, however, are instructions of a departmental nature, non-compliance with which

cannot render the sanction invalid in law or have the effect of annulling the sale which was completed in consequence thereof. It might be that the Deputy Commissioner should in cases of doubt consult the Commissioner or the Financial Commissioner before he grants sanction; but once sanction has been given by him, it appears to be irrevocable and no authority has the power to override it.

Before concluding, I wish to make it clear that this decision deals with cases in which sanction of the Deputy Commissioner had been granted before sub-s. (8) was added to S. 2, Punjab Alienation of Land Act by Act 10 of 1938. It is not necessary for the purposes of this case to say what the effect of this amendment is. My learned brother Dalip Singh in his judgment has pointed out some of the difficulties which are likely to arise in its application to cases of this kind, but that is a matter which must be left for future determination, if and when it arises. For the reasons given above, I agree with the order proposed by my learned brethren that the order of the Financial Commissioner revoking the sanction was ultra vires and that it had no effect on the sale of the land in dispute effected by defendant 2 in favour of the plaintiff. The appeal must, accordingly, be accepted and the plaintiff's suit decreed, but in the circumstances the parties left to bear their own costs throughout.

G.N./R.K.

*Appeal accepted.***A. I. R. (29) 1942 Lahore 200****DALIP SINGH AND SALE JJ.***Ghulam Qadir—Defendant—Appellant*

v.

Alaf Din, Plaintiff and others, Defendants — Respondents.

Letters Patent Appeal No. 14 of 1940, Decided on 24th February 1942, from decree of Din Mohammad J., Reported in ('40) 87 A.I.R. 1940 Lah. 177.

(a) Custom (Punjab)—Hindu widow governed by custom—Alienation—Necessity — Whether alienation was for necessity or not—Income of estate is relevant consideration.

In the Punjab under the customary law relating to the estate of a Hindu widow the power of the widow is less than that of the Hindu law widow and the income of the estate is a relevant consideration for determining whether an alienation is or is not for necessity. The question whether in the case of a widow governed by custom an alienation by her of her husband's estate for debts incurred by her husband was or was not for necessity cannot be decided without reference to whether the income from the estate left by the husband was or was not sufficient to discharge the debt : ('86) 28 A. I. R. 1936 P. C. 283, *Rel. on.* [P 201 C 1, 2]

(b) Custom (Punjab) — Hindu widow—Alienation—Necessity—Onus.

The onus of proving that the alienation by Hindu widow governed by custom was for necessity lies on the alienee. [P 201 C 2]

(c) Custom (Punjab) — Hindu widow — Alienation — Necessity — Point that amount of income is irrelevant to question of necessity in widow's tribe cannot be raised for first time in Letters Patent appeal.

The point that in deciding the question whether an alienation by a Hindu widow governed by custom was or was not for necessity the amount of

income of estate is irrelevant in the particular tribe to which the widow belonged cannot be raised for the first time in Letters Patent appeal.

[P 201 C 2]

C. P. C. —

(40) Chitaley, Letters Patent (Cal.) Clause 15, N. 14 Pt. 1.

(41) Mulla, Page 1408 Pt. (y).

Khurshid Zaman — for Appellant.

Lala Mukand Lal Puri and Shamsheer Bahadar
— for Respondent 1.

DALIP SINGH J. — The sole question arising for decision in this Letters Patent appeal is whether in the case of a widow governed by custom an alienation by her of her husband's estate for debts incurred by her husband is necessary without reference to whether the income from the estate left by the husband was or was not sufficient to discharge the debt. The trial Court held as a fact that the income was insufficient but on appeal the learned District Judge reversed that decision and holding that the income was sufficient to discharge the debt incurred by the husband found that the alienation by the widow was not for necessity and therefore not binding on the reversioner. He therefore decreed the suit of the reversioner. On appeal to this Court the learned Judge in Single Bench pointed out that under the rulings of this Court the question whether such an alienation was or was not for necessity could not be decided without reference to the income in the hands of the widow. No authority to the contrary has been cited before us at all. The learned counsel for the appellant contends firstly on the strength of Mulla's Principles of Hindu Law at page 179, para. 181-A and the authority of certain rulings of the Madras High Court that as the widow is solely entitled to the income of the property left by her husband, she is not bound to spend that income in discharging the debts left by her husband and may validly alienate the husband's estate for the purpose of the discharge of those debts. There is another ruling of the Madras High Court where this ruling is explained by stating that this proposition only applies to the corpus of the husband's debt but does not apply to the interest accruing on that debt, which is properly chargeable to the income of the estate. It is difficult to recognize the distinction sought to be drawn by the learned Judges of the Madras High Court. Be that as it may, however, I do not think the analogy of Hindu law is really helpful in the case. The latest decision of the Privy Council on the subject is contained in 164 I. C. 27,¹ where though their Lordships do not explicitly lay down that the income in the hands of the widow should be taken into consideration, yet they mention the fact presumably as a relevant fact and justify the alienation on the ground that the income from the property was barely sufficient for the maintenance of the widow. Hindu law therefore cannot be said to have finally settled the point. If any thing, as I read the Privy Council ruling, the decision would show that the amount of the income is a relevant consideration in considering whether the alienation is for necessity or not. In any case, so far as the customary law relating to the estate of the widow is concerned, the rulings appear to be unanimous that the power of the widow is less than that of the Hindu law widow and that the income of the estate is a rele-

vant consideration for determining whether an alienation is or is not for necessity.

In these circumstances, all that the learned counsel could urge was that while admitting that the onus of proving that the alienation in question was for necessity lay on him, yet he was entitled to ask for a remand for the purposes of adducing evidence to prove that in this tribe the amount of the income was irrelevant to the question of necessity. I think it is too late for the appellant to raise this point now. In the first place, it is doubtful whether any good evidence would be forthcoming on such a point at all and secondly, such a request should have been made to the learned District Judge in the first instance; but at any rate, it should have been made to the learned Judge in Single Bench. No such request was made and I do not think it would be proper to remand the case now for the purpose. I would therefore dismiss this appeal with costs.

SALE J. — I agree.

G.N./R.K.

Appeal dismissed.

A. I. R. (29) 1942 Lahore 201

TEK CHAND AND BECKETT JJ.

Dr. Kishan Singh — Plaintiff —

Appellant

v.

Bachan Singh and others — Defendants
— Respondents.

First Appeal No. 69 of 1941, Decided on 6th March 1942; case referred to Division Bench by Abdul Rashid J., D/- 24th November 1941.

(a) Civil P. C. (1908), O. 41, R. 23A and O. 43, R. 1 (u) as amended by Lahore High Court and Part 10 — Conditions which every rule framed by High Court must satisfy stated — O. 41, R. 23A and O. 43, R. 1 (u) are intra vires of Lahore High Court.

It is essential for the validity of every rule framed by the High Court that the following conditions are satisfied: (i) the delegated power of legislation conferred on the High Court in Part 10 of the Code is limited to annulling, altering or adding to the rule in Sch. 1 of the Code; (ii) the rules framed must relate to matters regulating the procedure of the High Court or Subordinate Courts; and (iii) such rules must not be inconsistent with any provision in the body of the Code. Order 41, R. 23A as amended does not offend against S. 128, Civil P. C. It is in any way inconsistent with S. 151, Civil P. C., any other provision in the body of the Code. S. 151, Civil P. C., empowers an appellate Court remand a case (not covered by R. 23 or 25 of O. 41) under its inherent power "in the interest of justice". O. 41, R. 23A really makes explicit provision for such a remand order; it therefore far from being inconsistent with S. 151, Civil P. C., really gives effect to it. [P 202 C]

Section 104, Civil P. C., permits appeals not only from orders mentioned in O. 43, R. 1 as originally enacted but also from rules as might thereafter be added by the High Court under S. 122, Civil P. C. Accordingly, if the High Court adds a rule to O. 41, R. 23A making an order appealable, which was not appealable formerly such rule is automatically covered by S. 104. Both O. 43, R. 1 (u) and O. 41, R. 23A as amended are therefore intra vires of the Lahore High Court: (1868-64) 10 H.L.C. 1 *Disting.* [P 202 C 2; P 203]

1. (86) 23 A. I. R. 1936 P. C. 288; 164 I. C. 27 (P.C.), Venkata Hanumantha Bhushana Rao Garu v. Gade Subbaya.

- ^a (b) Civil P. C. (1908), S. 96—Appeal is creature of statute — Legislature may delegate power to create appeal to other authority—If such authority acts within powers conferred its rules have force of law.

An appeal is a creature of the statute; it cannot exist without clear legislative provision. But the Legislature may create an appeal while enacting a statute, or in the statute itself it may delegate the power to create it to another authority and if such authority acts within the power conferred on it, the rules framed by it have the force of law as if they were enacted by the Legislature itself. When power is given to such subordinate authority to "legislate conditionally" and "the conditions have been fulfilled, the legislation becomes absolute: 4 Cal. 172 (P.C.), *Rel. on.* [P 203 C 1, 2]

- ^b (c) Civil P. C. (1908), S. 122—S. 122 is wider than S. 26, Queen's Remembrancer's Act.

The phraseology of S. 122 is in no way analogous to that of S. 26, Queen's Remembrancer's Act (22 and 23 Vict., C. 21). Clearly it is much wider.

[P 203 C 1]

(d) Civil P. C. (1908), O. 41, Rr. 25 and 27 and R. 23A as amended by Lahore High Court — Appellate Court finding that trial Court did not frame proper issues and wrongly excluded certain documentary evidence—Case should be remanded under O. 41, Rr. 25 and 27 and not under O. 41, R. 23A.

Where the appellate Court finds that the trial Court had not framed proper issues and had wrongly excluded certain documentary evidence the appellate Court should frame additional issues and remand the case under Rr. 25 and 27. Remand under O. 41, R. 23A is improper. [P 203 C 2]

S. S. S. Jhanda Singh — for Appellant.

S. M. Sikri — for Respondents.

^a TEK CHAND J. — This is an appeal under O. 43, R. (1) (u), Civil P. C., from an order passed by the Senior Subordinate Judge, Ludhiana, under O. 41, R. 23-A setting aside the decree of the Court of first instance and remanding the case for retrial. The appeal came up for hearing before Abdul Rashid J. sitting in Single Bench, when a preliminary objection was raised by counsel for the respondent that the appeal was incompetent, as R. 23A of O. 41 made by the High Court under S. 122, Civil P. C., as well as the amendment made in R. 1 (u) of O. 43, providing an appeal from an order passed under R. 23A of O. 41, were ultra vires. In view of the general importance of the question, the learned Judge referred the case to a Division Bench. Rule 23A of O. 41 was added, and R. 1 (u) of O. 43 was amended, by the Lahore High Court under the rule making power conferred on it in Part 10 of the Code. It is not denied that in making these rules the procedure prescribed in Ss. 124, 126 and 127 of the Code was duly followed. The proposed amendments were reported upon by the Rule Committee; its report considered by the High Court; and the approval of the Provincial Government obtained. The rules so made and approved were then published in the Punjab Gazette (notification No. 216-R/XI-Y-1/XI-Y-25 dated 4th August 1938). It is contended however that in making these rules the High Court exceeded the power conferred upon it by Ss. 122 and 128. Section 122 enacts:

"High Courts constituted by His Majesty by Letters Patent . . . may, from time to time, after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts

subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in Sch. 1."

Section 128 (1) further lays down that the rules framed under S. 122 shall not be inconsistent with the provisions in the body of the Code, but subject thereto may provide for any matter relating to the procedure of civil Courts. Section 127 says that after the proper procedure for framing the rules has been followed and they have received the sanction of the Provincial Government and published in the Gazette they shall "have the same force and effect within the local jurisdiction of the High Court, which made them as if they had been contained in Schedule 1."

It will be seen that (i) the delegated power of legislation conferred on the High Court in Part 10 of the Code is limited to annulling, altering or adding to the rules in Sch. 1 of the Code; (ii) the rules framed must relate to matters regulating the procedure of the High Court or Subordinate Courts; and (iii) such rules must not be inconsistent with any provision in the body of the Code. It is essential for the validity of every rule framed by the High Court that these conditions are satisfied. The question for consideration therefore is whether the rules in question contravene any of these conditions. The learned counsel for the respondent points out that before the amended rules came into force, whenever an appellate Court found it necessary to remand a case, not covered by R. 23 or R. 25 of O. 41, it did so in the exercise of its inherent powers under S. 151 of the Code, and from such order of remand no appeal lay. Counsel maintains that by framing R. 23A the inherent powers of the appellate Court were *pro tanto* "transferred from the body of the Code to Sch. 1;" and that the amended R. 1 (u) of O. 43 created a new right of appeal which did not exist before and that this is not a matter "regulating the procedure" of the Courts but is a matter of substantive right. He contends therefore that the former rule contravenes condition (iii) and the latter rule goes beyond condition (ii), and, therefore, both rules are ultra vires. These contentions, though ingenious are, in my opinion, without substance.

Rule 23A of O. 41, as amended, does not offend against S. 128; it is not in any way inconsistent with S. 151 or any other provision in the body of the Code. If, as is contended, S. 151 empowers an appellate Court to remand a case (not covered by R. 23 or R. 25) under its inherent power "in the interest of justice," the present rule really makes explicit provision for such a remand order: it therefore far from being inconsistent with the section, really gives effect to it. Equally untenable is the contention as to the invalidity of the amendment of R. 1 (u) of O. 43. It seems clear that the Legislature contemplated that the High Courts, in the exercise of their rule-making power, could lay down a new procedure for a particular purpose and provide an appeal from an order passed in following that procedure. Section 104 of the Code enumerates the orders (as distinguished from decrees) which are made appealable, and cl. (1) of the rule provides that an appeal shall lie from "any order made under rules, from which an appeal is expressly allowed by rules." In S. 2 (18), "rules" is defined as meaning "rules and forms contained in Sch. 1 or made under S. 122 or S. 125." Section 104, therefore, permits appeals not only from orders mentioned in R. 1 of O. 43 as originally enacted but also from rules as might thereafter be added by the High Court under S. 122, after following the procedure laid down in Part 10. Accordingly, if the High Court adds a rule

to O. 43, making an order appealable, which was not appealable formerly, such rule is automatically covered by S. 104.

Mr. Sikri relied strongly upon the decision of the House of Lords in (1863-64) 10 H.L.C. 704 at p. 776 = 138 R.R. 382,¹ but that case is clearly distinguishable. By S. 26, Queen's Remembrancer's Act, (22 & 23 Vict., c. 21), the Barons of the Exchequer were given the power to frame rules with a view to extend, apply and adapt "the process, practice and mode of pleading" of the "plea side" of the Court of Exchequer to cases on its "revenue side." Acting under this power, the Lord Chief Baron and three of the Barons framed rules in 1863, allowing appeals against the decision on the revenue side of the Court of Exchequer to the Exchequer Chamber and also to the House of Lords and laid down the procedure regulating these appeals. In the case cited, an appeal was preferred under those rules to the Exchequer Chamber from an order passed on the revenue side of the Court. At the hearing of the appeal, a preliminary objection was successfully raised that the rules were ultra vires of the Barons of the Exchequer, as being beyond the authority conferred on them by S. 26, and on further appeal to the House of Lords this decision was affirmed. The decision proceeded on the peculiar wording of S. 26, Queen's Remembrancer's Act, which gave the Barons of the Court of Exchequer power to frame rules to assimilate "the process, practice and pleading" in cases on the "plea side" to those on the "revenue side" of the Court. The phraseology of S. 122, Civil P. C., is in no way, analogous to that of S. 26. Clearly, it is much wider: it authorises the High Courts to make rules regulating their own procedure and the procedure of the civil Courts subject to their superintendence and expressly empowers them by such rules to annul, alter or add to all or any of the rules in Sch. 1 of the Code, one of which (O 43, B. 1) enumerates the orders which are subject to appeal. It is interesting to note that in his speech in the House of Lords Lord Chancellor Westbury made it clear that the word "practice" in S. 26 of the Act under consideration was used in the common and ordinary sense as denoting the rule that makes or guides the *cursus curiae* and regulates the proceedings in a cause within the walls or limits of the Court itself. His Lordship repelled the contention of the Attorney-General that the words "process, practice and mode of pleading" were equivalent to "procedure," which denoted the whole course of a cause from its commencement in the Court of the first instance until its final adjudication in the Court of appeal.

Mr. Sikri laid emphasis on the observation of the Lord Chancellor that the "creation of a new right of appeal is plainly an act which requires legislative authority" and that it was not competent to the Barons under the limited powers conferred on them under S. 26 to create a new appeal from a decision of their own Court. This of course is so. An appeal is a creature of the statute, it cannot exist without clear legislative provision. But the Legislature may create an appeal while enacting a statute, or in the statute itself it may delegate the power to create it to another authority and if such authority acts within the power conferred on it, the rules framed by it have the force of law, as if they were

enacted by the Legislature itself: 4 Cal 172.² As observed by Lord Selborne at p. 132 of the judgment in that case when power is given to such subordinate authority to "legislate conditionally" and "the conditions have been fulfilled, the legislation becomes absolute." I have no doubt that both the rules in question are intra vires of the High Court and that the preliminary objection is devoid of force and must be overruled. On the merits, however, I am of opinion that the learned Senior Subordinate Judge acted improperly in remanding the case under R. 23A. He found that the trial Judge had not framed proper issues and had wrongly excluded certain documentary evidence which the appellant wished to produce. On these findings he should have framed additional issues and remanded the case under R. 25 and at the same time directed the trial Judge under R. 27 to admit the excluded evidence. There was no justification for setting aside the judgment and decree of the trial Court and remanding the case for rehearing and rededecision. In this case a retrial of the suit was not necessary, and the case should not have been remanded under R. 23A which invariably puts the parties to unnecessary expense and unduly prolongs the final decision. For the foregoing reasons, the appeal must be accepted, the case remitted to the Senior Subordinate Judge with a direction to restore the appeal at its original number and remand the case to the Court of first instance under O. 41, R. 25 and 27 to try issue 5 as framed by it and to admit the documentary evidence which had been excluded by it. On issue 5 both parties shall be allowed to produce such oral and documentary evidence as they wish to do, including copies of the *wajib-ul-arz*. Court-fee on this appeal shall be refunded; other costs shall be costs in the cause. Both counsel have been directed to cause their respective clients to appear before the Senior Subordinate Judge, Ludhiana, on 31st March 1942.

BECKETT J. — I agree.

G.N./R.K.

Appeal accepted.

2. ('79) 4 Cal 172 : 5 I. A. 178 : 3 C. L. R. 197 : 3 Sar. 834 (P. C.), *Empress v. Burah*.

A. I. R. (29) 1942 Lahore 203

YOUNG C. J.

Mrs. P. B. Bharucha on behalf of Miss Perin Bharucha — Petitioner

v.

Emperor.

Criminal Misc. Case No. 508 of 1941, Decided on 12th December 1941, for transfer of case.

Press (Emergency Powers) Act (1931), Section 2 (5) and (6) and S. 18 (1) — Accused distributing handbills to public containing words "Nearly 1000 Political Prisoners Detained in India without Trial" — Words held not news — Handbills held not newspaper or news-sheet but posters unauthorised issue whereof was no offence under Act — Arrests under Act should not be made without necessity — Arrest of accused held not justified — Summons would have been amply sufficient for what was only technical offence.

The material portion of the handbills distributed by the accused to the public was as follows: "Whither Democracy? Nearly 1000 Political Prisoners Detained in India without Trial";

1. (1863-64) 10 H.L.C. 704, 776; 10 Jur. (N.S.) 393, 446 : 33 L.J. Ex. 209 : 10 L.T. (N.S.) 494 : 4 N. R. 29 : 12 W.R. 641 : 138 R.R. 382, Attorney-General v. Sillem,

^a Held that the words "Nearly 1000 Political Prisoners Detained in India without Trial" in the handbill could hardly be called "news" within the dictionary meaning of the word, the information having been in possession of the public for some considerable time. Nor could the document be described as news-sheet or a simple form of newspaper. One item of "news" in any event would hardly constitute a newspaper. The documents distributed by the accused were handbills or posters and the unauthorised issue thereof was no offence under the Act : [P 204 C 2]

^b Held further that though an offence under the Act was cognizable and therefore the authorities were entitled to arrest, it was elementary that such powers ought to be exercised with discretion and arrests ought not to be made without necessity. There was little discretion and less consideration in ordering an arrest of the accused. A summons would have been amply sufficient for what at the most was obviously only a technical offence. [P 204 C 2]

J. L. Kapur, Inder Dev, Harbans Singh and R. C. Soni — for Petitioner.

M. Sleem, Advocate-General — for the Crown.

ORDER. — This is an application by Mrs. Bharucha, wife of the Inspector-General of Civil Hospitals, Punjab, Lahore, under S. 526A, Criminal P. C., praying for the transfer of the proceedings commenced in Simla against her daughter, Miss Perin Bharucha, M.A., aged 22, under S. 18, Press (Emergency Powers) Act, to a competent Court at Lahore. The facts are that Miss Perin Bharucha, in her youthful zeal for the liberties of the subjects, necessarily restricted perhaps during War, on 17th September 1941, distributed handbills or posters in Simla which contained the following words :

"PUNJAB CIVIL LIBERTIES UNION

Whither Democracy?

Nearly 1000 Political Prisoners Detained
in India without Trial.

We Demand :

1. No detention without Trial.
2. No Classification of Political Prisoners.
3. Humane Treatment for "C" Class and Security Prisoners.
4. Impartial Enquiry into Conditions of Detention.

Issued by the P. C. L. U.
Political Prisoners Relief
Sub-Committee."

^d A first information report was made on 27th October and Miss Bharucha was arrested in Lahore on 28th November and lodged in an institution commonly but incorrectly known as the "Female Jail." An application was subsequently made to the District Magistrate, Lahore, and she was released on bail. I issued notice to the Crown as it appeared to me that it was doubtful whether the publication of this poster amounted to an offence under S. 18 of the Act. Mr. Jiwan Lal Kapur has appeared for the petitioner and the learned Advocate-General has appeared for the Crown. Section 18 (1), Press (Emergency Powers) Act, reads as follows :

"Whoever makes, sells, distributes, publishes or publicly exhibits or keeps for sale, distribution, or publication, any unauthorized news-sheet or newspaper, shall be punishable with imprisonment which may extend to six months, or with fine or with both."

Section 2 (5) and (6) gives the definition of "news-paper" and "news-sheet" as follows :

"Newspaper" means any periodical work containing public news or comments on public news; "news-sheet" means any document other than a newspaper containing public news or comments on public news or any matter described in sub-s. (1) of S. 4."

It is alleged by the prosecution that this document is an unauthorised news-sheet. Mr. Jiwan Lal contends that this document is a poster and not a news-sheet. The Advocate-General, on the other hand, argues that the words, "Nearly 1000 Political Prisoners Detained in India without Trial" is news, and the words, "Whither Democracy?" is comment on that news. He concedes that these words do not constitute any other offence covered by S. 4 of the Act and are harmless. If the said publication is an offence it is purely a technical one. The Oxford Dictionary defines "news" as "new things, novelties; tidings; new information of recent events; new occurrences as a subject of report or talk;" and "news-sheet" is defined as "printed sheet containing news, a simple form of newspaper." The words "Nearly 1000 Political Prisoners Detained in India without Trial" under this definition can hardly be called "news," this information had been in possession of the public for some considerable time. Nor can the document be described as a simple form of newspaper. One item of "news" in any event would hardly constitute a newspaper. A broad view must be taken of this matter. If this document comes within the definition of a "news-sheet" it appears to be clear that a poster announcing, for instance, a Race Meeting or the finals of the Veterans Lawn Tennis Competition at which some eminent person was to present the cups would be a "news-sheet" within the meaning of this Act, and if so, authority to publish such a poster would have to be obtained under S. 15 (1) of the said Act from a Magistrate, otherwise the publication would be an offence for which the publisher would be liable to arrest and imprisonment. I have no knowledge of any such prosecution and I hope I never will have. The learned Advocate-General, however, argues that such posters would come within the meaning of the Act and the fact that no prosecution has yet been ordered does not mean that a prosecution cannot be ordered. I am satisfied that the Act was never meant to apply, and does not apply, to any such document nor indeed would I, unless compelled by authority which I must follow, assent to the proposition that the unauthorised publication of such a document is an offence.

In my opinion this and similar documents are not news-sheets but handbills or posters. A poster, according to the Oxford Dictionary, is a "placard posted or displayed in a public place as an announcement or advertisement." This definition appears to cover the document in this case. I can find no precedent, nor can counsel refer me to any, where it has been held that the unauthorized issue of such a poster is an offence under the Act. The proceedings under S. 18 of the Act in this case must therefore be quashed and I order accordingly. Though an offence under this Act is cognizable and therefore the authorities are entitled to arrest, it is I think elementary that such powers ought to be exercised with discretion and arrests ought not to be made without necessity. There appears to have been little discretion and less consideration in ordering an arrest in this case. A summons would have been amply sufficient for what at the most was obviously only a technical offence.

G.N./B.K.

Proceedings quashed.

A. I. R. (29) 1942 Lahore 205

YOUNG C. J. AND BECKETT J.

*Mt. Kanta Devi daughter of Lala
Ram Chand — Plaintiff—Petitioner*

v.

*Sm. Kalawati w/o Lala Nand Kishore
and others—Defendants—Respondents.*

Civil Original Case No. 270 of 1940, Decided on
6th November 1941, referred to Division Bench by
Monroe J., D/- 5th June 1941.

(a) Civil P. C. (1908), S. 147 and O. 32 R. 7—
Consent decree against minor — Guardian's
negligence is not in itself sufficient to set aside
decree — It can only be set aside on ground of
fraud actual or constructive—Fraud must be
definitely made cause of action—Facts consti-
tuting fraud must be specifically set out —
General charge of negligence is not sufficient
— Fraud is to be judged from surrounding cir-
cumstances.

Section 147 makes it clear that a minor stands on
the same footing as an adult when a compromise
has been effected on his behalf with the express leave
of the Court, and since an adult cannot seek to avoid
a decree on the bare ground of negligence in his
agent, a minor cannot claim a better footing. The
negligence of a guardian ad litem is not in itself a
ground for setting aside a consent decree against a
minor which can only be set aside on the ground of
fraud actual or constructive. That fraud must be
definitely made a cause of action and the facts con-
stituting the fraud must be clearly and specifically
set out. It is not sufficient to make a general charge
of negligence against a guardian or to say in general
terms that the Court sanctioning the compromise
has acted under a misapprehension. Fraud and
similar grounds for avoiding a decree have to be
judged from surrounding circumstances : (1865) 2
De. G. J. & S. 373, *Rel. on; Case law referred.*

[P 206 C 1 ; P 207 C 1]

C. P. C.—

(40) Chitaley, S. 147 N. 2 and O. 32 R. 7 N. 18
Pts. 1, 2 and 4.

(41) Mulla, Page 1028, N. "Compromise decree
when binding on minor."

(b) Minor — Guardian—Negligence —To be
unwary or confiding is not exactly negligence.

The fact that the guardian of the minor was
unwary or confiding is not exactly the same thing
as negligence on the part of the guardian.

[P 206 C 2]

C. P. C.—

(40) Chitaley, O. 32 R. 3 N. 12.

(c) Minor—Compromise on behalf of minor
—Correct position explained.

The object of a compromise is usually to avoid the
expenses of a lengthy trial. It is not for the ad-
vantage of the minors generally that the other
party should not be entitled to treat matters finally
settled if a compromise is arranged on behalf of a
minor.

[P 207 C 1]

C. P. C.—

(40) Chitaley, O. 28 R. 3 N. 2 and O. 32 R. 7
N. 2.

(41) Mulla, Page 1027 N. "Scope of the Rule."

(d) Practice—Legal question in general form
referred to High Court answered—It is for trial
Court to apply law to facts set out in pleadings.

Where a legal question in general form referred
to it is answered by the High Court, it is for the
trial Court and not High Court to apply the law to
the facts set out in the pleadings. [P 207 C 1]

C. P. C.—

(40) Chitaley, O. 46 R. 1 N. 3 and R. 3 N. 1.

(41) Mulla, Pages 1023-1026 N. "Such Court
shall. . . . High Court."

Dev Raj Sawhney and Qabul Chand—

for Petitioner.

Bishen Narain, Vishnoo Datta and Tek Chand
(for certain creditors) — for Respondents.

Bashir Ahmad — for Official Receiver.

BECKETT J. — The question which has been
referred to this Bench is whether the negligence of
a guardian ad litem is sufficient ground for setting
aside a decree against a minor. This question has
arisen in a suit in which it is being sought to set
aside a decree passed on the basis of a compromise.
At the time of the compromise the plaintiff was a
minor and was represented by her husband who
entered into a compromise on her behalf.

The question has been referred to us in a general
form because there is conflict of decisions on the
point and a final decision at this stage might pos-
sibly save the expense of a lengthy trial. 54 All.
646¹ has been cited as an authority for the propo-
sition that the negligence of a guardian ad litem is
sufficient ground for setting aside a decree, while
I.L.R. (1939) Bom. 340² has been cited as an au-
thority on the other side. In the present case, however,
it seems to us that the scope of the question is
definitely limited by the fact that there are statutory
provisions which control the operation of compro-
mise decrees in which minors are concerned ; and
we propose to deal only with the grounds on which
decrees of this kind can be ignored or set aside.

Order 32, R. 7, Civil P. C., runs as follows :

"No next friend or guardian for the suit shall,
without the leave of the Court, expressly recorded
in the proceedings, enter into any agreement or com-
promise on behalf of a minor with reference to the
suit in which he acts as next friend or guardian."

(2) Any such agreement or compromise entered
into without the leave of the Court so recorded
shall be voidable against all parties other than the
minor."

This rule, however, has to be read in conjunction
with S. 147 of the Code itself which lays down the
general effect of any arrangements made on behalf
of a person under a legal disability with the express
leave of the Court. The section runs as follows :

"In all suits to which any person under disability
is a party, any consent or agreement, as to any pro-
ceeding shall, if given or made with the express
leave of the Court by the next friend or guardian
for the suit, have the same force and effect as if
such person were under no disability and had given
such consent or made such agreement."

This section was newly incorporated in the Code
of 1908 and is based on O. 16, R. 21 of the Rules of
the Supreme Court of Judicature in England. The
legal position in England is stated as follows in
Halsbury's Laws of England, Edn. 2, Volume 17,
Para. 1469 at page 717 :

1. (82) 19 A.L.R. 1932 All. 293 : 138 I. C. 465 : 54
All. 646 : 1932 A.L.J. 487 (F.B.), *Mt. Siraj Fatma*
v. Mahmud Ali.

2. (89) 28 A. I. R. 1939 Bom. 88 : 180 I. C. 51 :
I. L. R. (1939) Bom. 340 : 41 Bom.L.R. 59 (F.B.),
Krishnadas Padmanshbrao v. Vithoba Annappa.

"When a compromise has been sanctioned by the Court it will only be set aside on the same strong grounds of fraud as would justify the setting aside of a compromise between adults."

On the plain face of it S. 147 would appear to make it clear that a minor stands on the same footing as an adult when a compromise has been effected on his behalf with the express leave of the Court, and since an adult cannot seek to avoid a decree on the bare ground of negligence in his agent a minor cannot claim a better footing. Mr. Dev Raj Sawhney, who seeks to establish the proposition that a consent decree against a minor can be set aside on the ground of negligence alone, admits that he has not been able to find any decision in his favour in which the effect of S. 147 was discussed. At the same time, he contends that there are a number of leading cases in which such decrees have been set aside on the ground of negligence in a guardian or a next friend, and he argues that the effect of Section 147 must have been taken into consideration, even if it may not have been specifically mentioned. An examination of these decisions does not appear to us to bear out the suggestion that a minor can claim to avoid a consent decree on grounds which would not allow an adult to claim the same relief. It is to be remembered that fraud and similar grounds for avoiding a decree have to be judged from surrounding circumstances, and minors are not the only persons who may be dependent upon the good faith of others, as for example, when a pardanashin lady is concerned. It is sometimes rather widely stated that a minor is entitled to avoid a compromise decree on the ground of fraud or gross negligence on the part of his guardian; but it would appear from the reported decisions that, so far as negligence is concerned, the term is only used in a special and restricted sense. One of the leading English cases on the subject is (1865) 2 De G. J. & S. 373.³ The observations of Turner L. J., have been quoted more than once in this connexion; but since those appear to us to cover most of the principles which can be taken as having been laid down in the decided cases, it is perhaps worth while to quote them again :

"They must be such as to amount to fraud in the party claiming the benefit of the compromise, meaning by fraud not moral fraud, but what in the eye of this Court is considered as amounting to fraud. A compromise of doubtful rights between adult parties cannot, as I conceive, be set aside on any other ground. If there be no fraud, and equal knowledge on both sides, the compromise cannot be disturbed, but if there is knowledge on one side which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts in the view of a Court of Equity to fraud. The rule which applies to adults seems to me to be not less applicable to compromises by the Court on behalf of infants."

The rule of law in India does not appear to us to be substantially different from that which is thus laid down. Most of the Indian decisions can be classed under three heads. In the first place, there are those cases in which either active fraud is alleged or the acts of negligence are such as to raise a presumption of fraud and collusion. A recent example in this class is A. I. R. 1938 Mad. 13.⁴ It is

there stated as a general rule that a consent decree against a minor can be set aside on the ground of fraud, collusion or gross negligence on the part of the next friend or guardian ad litem. But the facts show that certain important matters were known to one of the parties, who deliberately chose to assert a claim which was false to his knowledge and withheld this knowledge from the Court. The decision was largely based upon the English authority already mentioned, and the case appears to have been substantially one of fraud. To the same group belong two judgments of the Privy Council on which Mr. Dev Raj Sawhney relies, 45 Cal. 17⁵ and 47 Mad. 181.⁶ In both these cases claims had been put forward in which it was held that the principal party concerned could have acted under no honest or bona fide belief; and although some of the parties affected by the compromise happened to be minors, the fact of their minority was not stressed except as an explanatory circumstance. In one of these cases, the compromise was accepted by a pardanashin lady on behalf of her minor sons and her acceptance was apparently due to her difficulty in obtaining disinterested legal advice. To be unwary or confiding is not exactly the same thing as negligence. The substantial reason for setting aside the decree was that it was bound to have been obtained by fraud and it is by no means clear that the position would have been any different if the pardanashin lady had not been acting on behalf of her minor children.

In the second place, there may be cases in which it may be held that there has been no effective representation of the minor concerned. A reference to this possibility is to be found in 54 All. 646¹ at page 666; but it appears that in that case the alleged negligence of the guardian consisted of the omission to file a civil suit as directed by the revenue Court. The facts were peculiar, and the case itself was not one relating to a compromise decree. When the express leave of the Court is obtained for a compromise on behalf of a minor it seems hardly likely that leave would be given unless the minor is properly represented; and while the possibility should not perhaps be entirely excluded, it seems extremely remote. In the third class we have those cases in which it has been held that the leave of the Court has been improperly obtained, so that there has been in fact no legal sanction, which remains voidable at the instance of the minor. 1 Lah. 847² was decided on the ground that there could be no doubt that the compromise on behalf of the minors had been sanctioned under a misapprehension of material facts, and that the decree based upon such a compromise was not binding upon them. It was held that it was unnecessary to consider whether it was due to fraud practised upon the Court, or to the negligence of the guardian that the matter was not brought to the knowledge of the Court. The decision was based upon 6 Cal. 687.³ This was another decision based upon the observations of Turner L. J. The case was one in which executors were concern-

5. ('17) 4 A. I. R. 1917 P. C. 146 : 42 I.C. 849 : 45 Cal. 17 : 44 I.A. 229 (P.C.), *Mt. Gunjeshwar Kunwar v. Durga Prasad Singh*.

6. ('24) 11 A. I. R. 1924 P. C. 56 : 79 I.C. 981 : 47 Mad. 181 : 51 I. A. 145 (P. C.), *Kandama Najicker v. Kandasami Goundar*.

7. ('20) 7 A. I. R. 1920 Lah. 408 : 56 I. C. 878 : 1 Lah. 344 : 68 P. L. R. 1920, *Jhanda Singh v. Mt. Lachhmi*.

8. ('81) 6 Cal. 687 : 8 C. L. R. 169, *Bibee Solomon v. Abdool Azeem*.

3. (1865) 2 De G. J. & S. 373 : 34 L. J. Ch. 65 : 10 Jur. (N.S.) 1114 : 11 L. T. (N.S.) 392 : 13 W.R. 1115 : 189 R. E. 134, *Brooke v. Lord Mostyn*.

4. ('38) 25 A. I. R. 1938 Mad. 13 : 176 I. C. 477, *Dumala Narasu v. Ingili Baitharu*.

a ed, and the question was whether the Court had been misled when sanctioning a compromise. It was held that, although there had been no fraud on the part of the executors and that they were not even aware of certain matters which should have been brought to the notice of the Court, they had a particular duty in the case such as to carry with it the consequences of the knowledge; and as the compromise had in consequence been sanctioned by the Court under a misapprehension of material facts, the compromise decree could be set aside.

In broad principles the third class is not far removed from the first class, the principle being that the compromise and subsequent decree are not to be treated as binding if brought about as a result of either actual or constructive fraud. It is not necessary that this fraud should be on the part of the guardian, though in some cases it may be facilitated by the negligence of the guardian. Mere negligence of the guardian is not of itself a ground for setting aside a consent decree against a minor, any more than the fact that the compromise can be shown not to have been for the benefit of the minor. In most cases, it would be impossible to say with certainty at the outset of a case what should or should not be done, whereas the object of a compromise is usually to avoid the expenses of a lengthy trial; and as has been often pointed out, it is not for the advantage of the minors generally that the other party should not be entitled to treat matters finally settled if a compromise is arranged on behalf of a minor. That this is the correct position in regard to a consent decree against a minor is not seriously disputed by either side in the present case, but we have been asked to apply the law to the pleadings in the suit and to say whether the case should now proceed or not. In the ordinary way, it is for the trial Judge to apply the law to the facts set out in the pleadings; and since it is only the legal question in its general form which has been referred to us, we see no reason for departing from the usual practice. The question referred will accordingly be answered by saying that negligence of a guardian *ad litem* is not in itself a ground for setting aside a consent decree against a minor, which can only be set aside on the ground of fraud, actual or constructive.

It seems unnecessary to add, but we have been asked by counsel for the defendants to do so, that fraud must be definitely made a cause of action and the facts constituting the fraud must be clearly and specifically set out. It is not sufficient to make a general charge of negligence against a guardian or to say in general terms that the Court sanctioning the compromise has acted under a misapprehension. The proceedings will now be returned to the referring Bench for further action, and costs of the reference will be costs in the cause.

G.N./B.K.

Answer accordingly.

A. I. R. (29) 1942 Lahore 207

TEK CHAND AND BECKETT JJ.

Allah Diwaya — Plaintiff —

Appellant

v.

Mt. Bakht Waddi and another —

Defendants — Respondents.

Second Appeal No. 408 of 1939, Decided on 29th January 1941, from decree of Dist. Judge, Dera Ghazi Khan, D/- 20th December 1938.

Custom (Punjab) — Succession — Biloches of Bughlani sub-section of Nutkani tribe of

Sanghar tahsil Dera Ghazi Khan District are governed by Mahomedan law and not by custom.

In Biloches of the Bughlani sub-section of the Nutkani tribe, of Sanghar tahsil, Dera Gazi Khan district, daughters succeed along with brothers to their father's property in accordance with Mahomedan law and not by custom : 92 P.R. 1908 and 136 P.R. 1908, *Rel. on.* [P 208 C 2]

Achhru Ram — for Appellant.

Ishwar Chand and Shamair Chand —

for Respondent 1.

Mukhtar of Respondent 2, present in person.

TEK CHAND J. — The property in dispute belonged to Mahmud, a Biloch of the Bughlani sub-section of the Nutkani tribe, resident of mauza Bughlani in Sanghar tahsil of Dera Ghazi Khan district. Mahmud died in 1936 leaving him surviving a son Allah Diwaya and a daughter Mt. Hawa from one wife, and another daughter Mt. Bakht Waddi from another wife. Mutation of his land was sanctioned by the revenue authorities in the names of the son and the daughters in accordance with Mahomedan law and Allah Diwaya was entered as owner of one-half and Mt. Hawa and Mt. Bakht Waddi of one-fourth each. Allah Diwaya, however, managed to take possession of the entire land. He then instituted a suit in the civil Court for a declaration that he was the exclusive owner of the land as the sole heir of Mahmud and that the defendants, Mt. Hawa and Mt. Bakht Waddi, had no share in it. He alleged that in matters of succession the tribe of the parties did not follow Mahomedan law but was governed by custom prevailing among Biloches of the district, according to which daughters did not succeed to their father's property in the presence of sons.

Mt. Hawa did not resist the suit. She filed a written statement stating that she had never denied the plaintiff's right to succeed exclusively to the entire land left by Mahmud, and the plaintiff had unnecessarily brought the suit against her. She also stated that she had taken the share to which she was entitled in the lifetime of the father and had no claim against the plaintiff. The other daughter, Mt. Bakht Waddi, pleaded that in matters of inheritance Nutkani Biloches of Sanghar tahsil were governed not by custom but by Mahomedan law under which the plaintiff was entitled only to a half-share in the father's property and the daughters to one-fourth each. The trial Judge found the alleged custom proved and granted the plaintiff a decree for the declaration prayed for. From this decree Mt. Bakht Waddi alone appealed to the District Judge who, disagreeing with the trial Judge, held that the parties were governed by Mahomedan law. He, accordingly, accepted Mt. Bakht Waddi's appeal. In the decree, however, the whole suit was shown as having been dismissed; and not *qua* the share of Mt. Bakht Waddi, who alone had appealed against the trial Court's decree.

The plaintiff having obtained from the District Judge a certificate under S. 41 (3), Punjab Courts Act, has preferred a second appeal to this Court. At the hearing before us, Mt. Hawa appeared through a Mukhtar, who stated that she had not admitted the plaintiff's right to succeed to the entire property of their father and that she was entitled to one-fourth share like Mt. Bakht Waddi. But, as pointed out above, Mt. Hawa had filed a written statement confessing judgment and when the trial Court had decreed the plaintiff's suit she did not appeal to the District Judge. Mt. Bakht Waddi was

a the sole appellant and at the hearing of the appeal in the lower appellate Court she alone contested the lower Court's decree. Mt. Hawa did not appear, nor was it alleged on her behalf, as is now alleged by her mukhtar, that her confession of judgment in the trial Court had been made under misapprehension. She cannot be allowed in second appeal to resile from the position which she had deliberately taken up throughout the trial, and take advantage of the clerical mistake in the District Judge's decree, which was not prepared in accordance with the judgment and which erroneously dismissed the plaintiff's suit in its entirety. As between the plaintiff-appellant and the contesting respondent Mt. Bakht Waddi, the only point in dispute is whether the plaintiff has succeeded in proving the existence of a custom in the tribe under which daughters are excluded from succession to the property of their father in the presence of sons. b It is admitted that the initial onus is on the plaintiff. But it is urged that the entries in the riwaj-i-am shift the onus on to the defendant and that, in any case, the plaintiff has successfully discharged it by the evidence on the record. In support of the first contention, Mr. Achhru Ram referred us to the "Answer" to "Question" No. 28 in Diack's Customary Law of the Dera Ghazi Khan district, prepared in the course of the second Regular Settlement (1894-95), where it is stated that :

"The general custom among Biloches and Hindus is that if there are sons they inherit and the widow and daughters are entitled to maintenance only, while the more distant relatives are excluded. The Jat tribes, with a few exceptions who follow Biloch custom, the Sayyads and a few sections of the Nutkani tribe of Biloches, are governed by the provisions of the Mahomedan law, which admit widows and daughters as sharers in the estate even if there are sons."

c In the last settlement (1917-20) another volume of Customary law for the district was compiled by Mr. W. R. Wilson and in it the "Answer" to question No. 28 as recorded by Mr. Diack is repeated and it is stated that the prevailing custom was the same "as before". From this Mr. Achhru Ram contended that the general custom of Biloches of this district was against daughter's succession and that it lay on the defendant to prove that the Baghlani subsection of Nutkani Biloches was among the tribes which were stated in the "Answer" as following Mahomedan law. To elucidate the matter, we allowed the parties to produce vernacular copies of the relevant entries from the riwaj-i-ams of d Sanghar tehsil prepared in the Settlements of 1874, 1894-95 and 1917-20, and these entries put the matter beyond doubt. In the riwaj-i-am of Sanghar tehsil, compiled in the last Settlement (1917-20), there is a separate column for Nutkani Biloches and the answer given by them is that, in the presence of sons and widow, "daughters can take their share according to shariat (Mahomedan law) if they wanted it." Below the "Answer" are given particulars of several instances, in which daughters had actually succeeded along with sons among Nutkani Biloches. In the riwaj-i-am of the first Settlement (1872) also, it is stated that there are several instances of daughters having successfully obtained their Mahomedan law share. It is also mentioned that in Diwan Sawan Mal's time, too, whenever a daughter demanded her share it was given to her. It will thus be seen that the entries in the riwaj-i-ams, instead of supporting the plaintiff, are very much against his claim.

The evidence produced by the plaintiff at the

trial consists of the oral testimony of six witnesses and copies of ten mutations. The oral evidence is valueless and was not relied upon. Of the mutations, Ex. P. 8 does not deal with succession of daughters in presence of sons and is irrelevant. Exhibits P. 6, P. 7 and P. 9 are of no value as in none of them is it stated that a daughter was in existence. In Ex. P. 6 mutation was effected on the basis of a will and not according to the ordinary rule of inheritance in case of intestacy. In the four remaining cases (Exs. P. 3, P. 5, P. 10 and P. 11) sons alone succeeded in presence of daughters. Of these only one (Ex. P. 5) is of 1920, the other three are all recent and the claims of the daughters are still within time. But in all four instances, the property left by the last male holder was insignificant; the land-revenue assessed in each case was a few annas and the daughter's share was very small which, probably, they did not think it worth their while to claim. These instances are, obviously, insufficient to discharge the heavy onus which lay on the plaintiff, especially when there are at least two well-established instances of daughters having actually succeeded along with sons in accordance with Mahomedan law (Ex. D. 1 and Ex. D. 4). Then there is a reported case of the Chief Court in which it was held that in matters of succession Nutkani Biloches of Sanghar tehsil were governed by Mahomedan law: 92 P. R. 1908.¹ In that case the contest was between daughters and collaterals for the property of a sonless male proprietor; and in the body of the judgment it was observed that the evidence oral and documentary, was overwhelmingly in favour of the view that among Nutkani Biloches of this tehsil, daughters succeeded to their father's estates. In Sanghar, daughters appear to be particularly favoured among Biloches generally. In the riwaj-i-am of the last Settlement all Biloch tribes, except Khosas and Qaisaranis stated that their custom was the same as that of Nutkanis, i. e. "daughters can take their share according to Mahomedan law whenever they want it." Further, there are three other reported cases, 186 P. R. 1908² and C. A. No. 994 of 1889³ and C. A. No. 199 of 1895⁴ printed respectively at pp. 619 and 622 of Punjab Record of 1908, in which after very full and detailed enquiries it was held that among the various tribes of Biloches of Sanghar tehsil, daughters succeed to their father's ancestral property in accordance with Mahomedan law in the presence of near male agnatic heirs.

After giving the case careful consideration, we uphold the finding of the learned District Judge that in the tribe to which the parties belong daughters succeed along with brothers, to their father's property in accordance with Mahomedan law. The appeal, therefore, must fail as against Mt. Bakht Waddi respondent. But, as pointed out above, the error in the decree sheet of the learned District Judge relating to Mt. Hawa must be corrected. We accordingly accept the appeal and, in lieu of the decree of the lower appellate Court, pass a decree in favour of the plaintiff for a declaration that he is the owner of 3/4th of the land in suit, but that his

1. (08) 92 P. R. 1908: 29 P. L. R. 1909: 155 P. W. R. 1908, Ghulam Haidar v. Phaphal.

2. (08) 186 P. R. 1908: 206 P. L. R. 1908: 176 P. W. R. 1908, Sahai v. Ali Khan Mahammad.

3. (08) 186 P. R. 1908n, page 619, Mt. Gauhar v. Khan Muhammad.

4. (08) 186 P. R. 1908n, page 622, Khan Mahomed v. Sher Muhammad.

suit relating to 1/4th share of Mt. Bakht Waddi is dismissed. Mt. Bakht Waddi shall get her costs from the appellant in this Court. Mt. Hawa will bear her own costs.

K.S./R.K.

Order accordingly.

A. I. R. (29) 1942 Lahore 209

DALIP SINGH AND SALE JJ.

Harkishan Lal—Plaintiff—Appellant
v.

Barkat Ali and others — Defendants — Respondents.

Second Appeal No. 1288 of 1940, Decided on 10th February 1942, case referred to Division Bench by Tek Chand J., D/- 7th July 1941.

Court-fees Act (1870), S. 7 (iv) (c) and (v) — Whether suit is for declaration and consequential relief—Test—Sale by father of Hindu joint family—Suit by son for declaration that sale of joint property being without family necessity did not bind him and for joint possession of property sold with his father—Suit falls under S. 7 (iv) (c) — Plaintiff not being party to sale deed, suit cannot be regarded as for cancellation of sale deed.

The Court must look at the substance of the plaint in each case to determine whether the suit is really one for a declaration with a consequential relief or is merely a camouflage attempt in words to disguise a specific relief claimed in the garb of a suit for declaration coupled with a consequential relief: ('41) 28 A.I.R. 1941 Lah. 97 (F.B.), *Rel. on.*

[P 210 C 1]

Where it is open to the plaintiff to frame his suit in one or two ways there is no obligation in law that he should frame his suit in any other way than he would choose to frame it. In other words, if it is open to the plaintiff to bring a suit for possession or to bring a suit for a declaration with consequential relief for possession; it is entirely for the plaintiff to choose in which form he brings the suit and to the results that may flow from his choice in the way of limitation or otherwise the question of court-fee payable is wholly irrelevant. The court-fee will be determined on the nature of the suit as framed at the choice of the plaintiff always provided it is legally open to him to do so. It cannot be said that in all suits where possession is one of the reliefs claimed, the suit must of necessity fall within S. 7 (v) any more than if the relief was not possession but was somewhere specifically provided for say in Art. 1 of the Schedule the relief would necessarily fall within that article. It will depend on the facts and circumstances of each case whether the relief by way of possession or any other relief claimed is or is not consequential on the declaration sought.

[P 210 C 1, 2; P 211 C 1]

A suit by a son for a declaration that the sale of joint Hindu family property effected by his father had not been made for family necessity and was not binding on him, and for joint possession of the property sold along with his father falls under S. 7 (iv) (c) inasmuch as an alienation by the father of a Hindu joint family is not void but is only voidable at the instance of his sons, for the alienation may be binding on the sons if it was made for necessity or for the benefit of the joint Hindu family or for any other reason by which under Hindu law such an alienation may bind the sons. It is, therefore, necessary for the plaintiff to get rid of the voidable

document by having the Court declare that in the circumstances of the case it should be avoided at the plaintiff's request. The possession which hethen claims flows from and is a necessary consequence of the relief claimed, namely, that the document does not stand in the way of the plaintiff. The remedy of possession, therefore is essentially a consequential relief flowing from and arising out of the declaration sought by the plaintiff : *Case law referred.*

[P 210 C 2]

The suit by the son cannot be treated as one for cancellation of the sale deed; because the plaintiff does not say that the document must be cancelled as against his father, the executant, but only that it shall not be valid as against himself, he being no party to the document.

[P 211 C 1]

*Prem Nath—*for Appellant.

Madan Mohan Kapur, Kartar Singh, Ajit Ram f and Bal Kishen — for Respondents.

DALIP SINGH J. — The facts of this case are that a suit was instituted by the present plaintiff alleging himself to be the son of a certain alienor for a declaration that the sale of certain joint Hindu family property effected by the alienor, the father of the present plaintiff, had not been made for family necessity and consideration and was, therefore, not binding on the present plaintiff. Secondly, he asked for joint possession of the property sold along with his father. The question was raised in the trial Court whether this suit fell within the purview of S. 7 (iv) (c), Court-fees Act, or whether it fell within S. 7 (v) and an ad valorem court-fee was payable on the market value of the property. The trial Court upheld the objection taken by the defendants that the plaint was insufficiently stamped and on the refusal of the plaintiff to make good the deficiency in the court-fee it rejected the plaint under O. 7, R. 2, Civil P. C. On appeal to the Senior Subordinate Judge, that learned Judge affirmed the order of the lower Court and dismissed the appeal preferring to follow the Madras view in preference to the Patna and Allahabad views. On appeal to this Court the learned Judge in Single Bench has referred this case to a Division Bench on the ground that there is no direct authority of this Court bearing on the point and there appears to be a conflict between the Madras High Court and the Allahabad and Patna High Courts. We have heard the learned counsel for the appellant and two learned counsel on behalf of various respondents in this case representing various alienees from the original vendees or alienees from them. We have been referred to the following rulings: 47 All. 78,¹ a Single Bench ruling which approved of 44 All. 629,² another Single Bench ruling, and 50 All. 610³ another Single Bench ruling of the Allahabad High Court. We have also been referred to 54 All. 812,^{4a} a Full Bench ruling of the Allahabad High Court. As regards the Patna High Court, we have been referred to 56 I.C.

1. ('24) 11 A.I.R. 1924 All. 612 : 84 I. C. 624 : 47 All. 78 : 22 A.L.J. 945, *Mt. Ganga Dei v. Sukhdeo Prasad.*

2. ('22) 9 A.I.R. 1922 All. 358 : 68 I.C. 265 : 44 All. 629 : 20 A.L.J. 587, *Bup Narain v. Biahwa Nath Singh.*

3. ('28) 15 A.I.R. 1928 All. 248 : 115 I.C. 655 : 50 All. 610 : 26 A. L. J. 316, *Tula Ram v. Dwarka Das.*

4. ('32) 19 A.I.R. 1932 All. 485 : 139 I. C. 32 : 54 All. 812 : 1932 A. L. J. 634 (F. B.), *Kalu Ram v. Babu Lal.*

422,⁵ A.I.R. 1921 Pat. 57⁶, A. I. R. 1937 Pat. 141,⁷ 2 Pat. 125,⁸ A. I. R. 1934 Pat. 641⁹ and 16 Pat. 766.¹⁰

As regards the Madras High Court, we have been referred to A.I.R. 1938 Mad. 921,¹¹ A.I.R. 1939 Mad. 462¹² and A. I. R. 1937 Mad. 529.¹³ In Rangoon we have been referred to 9 Rang. 401¹⁴ and in Oudh Chief Court 5 Luck. 474.¹⁵ As regards rulings of our own Court we have been referred to 43 P. L. R. 106.¹⁶ I do not think it necessary to go into say lengthy analysis of these rulings of the various High Courts, more especially as it appears to me that the matter can be settled on principles approved of by all Courts, to the best of my knowledge, and at any rate, no ruling has been brought to our attention here which refutes these principles. In our own Full Bench, 43 P. L. R. 106¹⁶ it was laid down that the Court has to look at the substance of the plaint in each case to determine whether the suit is really one for a declaration with a consequential relief or is merely a camouflage attempt in words to disguise a specific relief claimed in the garb of a suit for declaration coupled with a consequential relief. With this proposition I may say with all respect that I entirely agree. The next fundamental proposition to my mind is that where it is open to the plaintiff to frame his suit in one or two ways there is no obligation in law that he should frame his suit in any other way than he would choose to frame it. In other words, if it is open to the plaintiff to bring a suit for possession or to bring a suit for a declaration with consequential relief for possession; it is entirely for the plaintiff to choose in which form he brings the suit and to the results that may flow from his choice in the way of limitation or otherwise the question of court-fee payable is wholly irrelevant. The court-fee will be determined on the nature of the suit as framed at the choice of the plaintiff always provided it is

legally open to him to do so. I will add short illustrations to bring out my meaning.

If the plaintiff brings a suit for possession of certain property then that suit would fall under S. 7 (v), Court-fees Act. If the plaintiff chooses to frame his suit which is essentially a suit for possession and asks that it be declared that he is the owner or a limited owner of certain property and then asks for possession as a consequential relief such a suit is in substance no more than a suit for possession and the plaintiff cannot merely by splitting the relief of possession into two distinct reliefs, namely, one for a declaration declaring his right to possess and another for actual possession, convert the suit for possession into a suit for a declaration coupled with a consequential relief. But there may be other classes of cases where, though the plaintiff may be entitled to bring a suit for possession pure and simple yet he is also entitled to bring a suit for declaration coupled with a relief by way of possession. Such cases are generally cases where the plaintiff alleges that he has a right to possess but a certain decree or other document whether by way of alienation or otherwise stands in the way of his right to possess which would arise from his title. In such a case, it may be open to the plaintiff to ignore the decree or document entirely treating it as a nullity and bring a suit for possession pure and simple. But there is no compulsion on him to do so and if he chooses to bring a suit in the form of a declaration that the document in question does not bind him and that therefore, his title to the property gives him a right to possession he is entitled to do so, provided there is no other objection to the form of the suit. If there is such an objection this will appear later when the Court goes into the matter but initially the suit as framed will lie and, as I have stated, court-fee will be determined by the initial frame of the suit. It may well be that a suit brought in this form may be subject to a variety of objections which will later arise in the disposition of the suit according to law but this has nothing to do with the question whether the suit as framed demands a court-fee according to S. 7 (iv) or demands a court-fee under S. 7 (v), Court-fees Act. It is not possible to hold that in all suits where the consequential relief claimed is possession the suit must of necessity fall under S. 7 (v).

There is one exception to the above rule, namely, where on the allegations in the plaint itself the document, which is alleged to stand in his way, is not voidable but is void. In such a case, it is obvious that a prayer for a declaration that the document be declared void is a surplusage and the suit again remains a suit for possession. The matter is otherwise where, as in this case, the document that stands in the way of the plaintiff's right to possess is not void but is only voidable. An alienation by the father of a Hindu joint family is not void but is only voidable at the instance of his sons for the alienation may be binding on the sons if it was made for necessity or for the benefit of the joint Hindu family or for any other reason by which under Hindu law such an alienation may bind the sons. It is, therefore, necessary for the plaintiff to get rid of this voidable document by having the Court declare that in the circumstances of the case it should be avoided at the plaintiff's request. The possession which he then claims flows from and is a necessary consequence of the relief claimed, namely, that the document does not stand in the way of the plaintiff. The remedy of possession, therefore, is essentially in this case a consequential

5. ('23) 10 A. I. R. 1923 Pat. 100 : 56 I.C. 422 : 5 Pat. L.J. 339, Ugra Mohan v. Lachhmi Prasad.
6. ('21) 8 A.I.R. 1921 Pat. 57 : 61 I.C. 565 : 6 Pat. L.J. 101 : 2 P.L.T. 607, Kheta Mohan v. Ganesh Lal.
7. ('37) 24 A. I. R. 1937 Pat. 141 : 165 I. C. 213 : 17 P. L. T. 677, Nokhelal Jha v. Srimati Rajeshwari Kumari.
8. ('22) 9 A. I. R. 1922 Pat. 615 : 68 I. C. 700 : 2 Pat. 125 : 3 P. L. T. 704 (S. B.), Ram Sumran Prasad v. Gobind Das.
9. ('34) 21 A. I. R. 1934 Pat. 641 : 152 I. C. 1003 : 14 Pat. 220 : 16 P. L. T. 69, Ram Bhusan Das v. Bachu Rai.
10. ('38) 25 A. I. R. 1938 Pat. 22 : 172 I. C. 840 : 16 Pat. 766 : 18 P. L. T. 977 (F. B.), Ramkhelawan Sahu v. Surendra Sahi.
11. ('38) 25 A. I. R. 1938 Mad. 921 : 182 I. C. 878, Venkatakrishnaiah v. Allishahib.
12. ('39) 26 A. I. R. 1939 Mad 462 : 183 I. C. 95 : I. L. R. (1939) Mad. 764 : (1939) 1 M. L. J. 702 (F. B.), Kutumba Sastri v. Bala Tripura Sundaramma.
13. ('37) 24 A. I. R. 1937 Mad 529 : 170 I. C. 578 : I. L. R. (1937) Mad. 672 : (1937) 1 M. L. J. 739, Amina Bibi v. Kadir Bataha Rowther.
14. ('31) 18 A. I. R. 1931 Rang. 319 : 134 I. C. 1263* : 9 Rang. 401, Maung Shein v. Ma Lon Ton.
15. ('80) 17 A.I.R. 1980 Oudh 104 : 124 I. C. 420 : 5 Luck. 474 : 6 O. W. N. 1105, Deoraj v. Kunj Behari.
16. ('41) 28 A. I. R. 1941 Lah. 97 : 193 I. C. 641 : I. L. R. (1941) Lah. 451 : 43 P. L. E. 106 (F. B.), Mt. Zohar Begam v. Din Muhammad.

relief flowing from and arising out of the declaration sought by the plaintiff. Such a case appears to me clearly to fall within the purview of S. 7 (iv) (c), Court-fees Act. That section expressly provides for suits where declaration is sought with consequential relief. It is nowhere laid down that the consequential relief shall not be such a relief as may if not consequential fall within some specific Article. Therefore, it cannot be held that in all suits where possession is one of the reliefs claimed the suit must fall within S. 7 (v), Court-fees Act, any more than if the relief was not possession but was somewhere specifically provided for say in Art. 1 of the Schedule, the relief would necessarily fall within that Article. It will depend on the facts and circumstances of each case whether the relief by way of possession or any other relief claimed is or is not consequential on the declaration sought. If it is consequential on the declaration sought then the suit would fall under S. 7 (iv) (c); if it is not so consequential then the suit may fall if relief claimed was possession partly under S. 7 (v) or if the relief was not for possession but did come within Art. 1, Sch. 1 then under that Article. In this case, however, the suit seems to me to fall clearly within S. 7 (iv) (c). I would, therefore, accept this appeal and return the case to the trial Court for disposal according to law. Parties will bear their own costs, so far incurred.

I omitted to notice an argument advanced by one counsel apparently for the first time in this Court, namely, that this suit is not a suit for declaration but is a suit for a cancellation of the sale deed. The short answer to this argument is that the suit is only for a declaration and not for a cancellation of the sale deed, because the plaintiff does not say that the document must be cancelled as against his father, the executant, but only that it shall not be valid as against himself, he being no party to the document. The suit, therefore, is one for declaration and is not a suit for cancellation of any sale deed.

SALE J.—I agree.

G.N./R.K. _____ Order accordingly.

**** A. I. R. (29) 1942 Lahore 211**

FULL BENCH

TEK CHAND, MONROE AND
MUHAMMAD MUNIR JJ.

*Bhagat Ram and others — Debtors —
Petitioners*

v.

*Firm Dhanpat Mal Jawala Dass
through B. Ram Narain and others
— Creditors — Respondents.*

Civil Revn. Petn. No. 185 of 1941, Decided on 20th May 1942, referred to Full Bench by Din Mohammad J., D/- 18th March 1942.

**** Provincial Insolvency Act (1920), Ss. 75 and 17 —** Adjudication of debtor is not matter purely personal to him but affects his property and heirs — Debtor adjudicated insolvent on creditor's petition — Appeal by insolvent — Insolvent dying pending appeal — Right survives in favour of heirs — Heirs are entitled to be brought on record and to continue appeal — Same principle applies where debtor is adjudicated on his petition and creditors appeal : 69 P.R. 1888 and 9 Lah. 306 = ('28) 15 A.I.R. 1928 Lah. 119 = 107 I.C. 281, **OVERRULLED**.

The adjudication of a person as an insolvent is not a matter purely personal to him. It affects not only his person but also his property which but for the adjudication would, on his death, have devolved on his heirs. The heirs have a material interest in the proceedings which have a very far-reaching effect on their rights. The right to resist the creditor's application for adjudication is, therefore, not a mere personal right which lapses on the death of the insolvent; it is a right which survives. Consequently where during the pendency of an appeal by the insolvent against his adjudication as insolvent on the petition of a creditor, the insolvent dies, the appeal does not abate. The right survives in favour of his heirs who are entitled to be brought on the record and to continue the appeal. The same consideration will apply equally, if the debtor had been adjudicated insolvent on his own application and the creditors had appealed making him a respondent but he had died. In that case also the heirs have material interest in the decision of the appeal and are entitled to be brought on record : 69 P.R. 1888 and 9 Lah. 306 = ('28) 15 A.I.R. 1928 Lah. 119 = 107 I.C. 281, **OVERRULLED**; ('37) 24 A.I.R. 1937 All. 435, *Rel. on*; ('32) 19 A.I.R. 1932 Lah. 121, *Expl. and Disting.*; *Case law discussed*. [P 213 C 2]

F. C. Mital — for Petitioners.

Sardar Harnam Singh — for Respondents.

TEK CHAND J. — The facts of the case which has given rise to this reference to the Full Bench are as follows : The respondents were the creditors of one Bansi Dhar and they applied for his adjudication as an insolvent. Bansi Dhar opposed the application, but his objections were overruled and an order of adjudication was passed by the Insolvency Judge. From this order Bansi Dhar appealed to the District Judge. During the pendency of the appeal, he died and his sons, the present petitioners, made an application under O. 22, Rr. 3/11, Civil P. C., for being brought on the record and allowed to continue the appeal. The learned District Judge rejected the application holding that on Bansi Dhar's death "the right to sue" did not survive and the appeal had abated, and he passed an order dismissing it. In coming to this conclusion he relied on three Punjab rulings, 69 P.R. 1888, 19 Lah. 306² and 13 Lah. 396.³ The sons of Bansi Dhar moved this Court for revision of this order, and at the hearing before Din Mohammad J. it was contended on their behalf that the rulings above referred to did not lay down correct law and had been dissented from in other High Courts. The question of law involved being of general importance the learned Judge has referred the case to a Full Bench.

In 69 P.R. 1888¹ two persons had applied for being adjudicated as insolvents under S. 844, Civil P. C. of 1882. The Subordinate Judge granted the application and passed the order of adjudication. The opposing creditors appealed to the Chief Court. During the pendency of the appeal one of the debtor-respondents died and no application to bring his representatives on the record was made within the time prescribed by law. Plowden and Rattigan JJ.

1. ('88) 69 P. R. 1888, Hardhian Sing v. Sham Sundar.
2. ('28) 15 A.I.R. 1928 Lah. 119 : 107 I.C. 281 : 9 Lah. 306 : 29 P.L.R. 599, Narain Singh v. Gurbakhsh Singh.
3. ('32) 19 A.I.R. 1932 Lah. 121 : 135 I.C. 196 : 13 Lah. 596 : 32 P.L.R. 909, Attar Chand v. Mian Mohammad.

held that the appeal had abated against the deceased respondent, but could be heard against the surviving respondent. In coming to this conclusion, the learned Judges observed that an order made under S. 351, Civil P. C., adjudicating a person as insolvent, was purely personal to him and that on the death of the insolvent no one represented him for the purpose of defending an appeal against an order declaring him insolvent any more than for the purpose of prosecuting an appeal against an order rejecting the application.

The provisions of the Civil Procedure Code of 1882 relating to insolvency were repealed in 1907, when the Provincial Insolvency Act (3 of 1907) was passed. Section 10 of the Act contained a new provision relating to the continuance of proceedings on the death of the debtor. It laid down that "if a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise directs, be continued *"as if he were alive."* It will appear from this section that the Legislature did not contemplate abatement of the proceedings on the death of the debtor : it expressly provided that they would continue *"as if he were alive."* Some difficulty was felt in interpreting the words underlined (here italicized). Accordingly, when Act 3 of 1907 was repealed by Act 5 of 1920, in S. 17 of the new Act (which corresponds to S. 10 of the earlier Act) the words "shall continue as if he were alive" were replaced by the words "shall be continued so far as may be necessary for the realisation and distribution of the property of the debtor". This alteration, however, did not effect any substantial change in the law. The proceedings do not abate under the present Act. They continue notwithstanding the death of the debtor by or against whom an insolvency petition had been presented. The object of continuing the proceedings has been made clear. Reference may also be made to S. 47 of Act 3 of 1907, which has been replaced by S. 5 in the Act of 1920, where it is laid down that "subject to the provisions of this Act the Court in regard to proceedings under this Act shall have the same powers and shall follow the same procedure as it has followed in the exercise of original civil jurisdiction."

The only reported case of this Court under the Act of 1907 in which the question arose is a decision by Abdul Raof J. sitting in Single Bench reported in A. I. R. 1921 Lah. 351⁴ where he held, after reference to the provisions of S. 10 and S. 47 of that Act, that by reason of the death of the insolvent, proceedings in insolvency do not abate and the Court has the power to bring on the record of the insolvency proceedings the legal representatives of the deceased. The judgment is, however, brief and no reference appears to have been made to the Chief Court decision in 69 P. B. 1888⁵. The next reported case is 9 Lah. 306² decided by Shadi Lal C. J. and Zafar Ali J. In that case a debtor had applied for his adjudication as an insolvent under the Provincial Insolvency Act, 5 of 1920. The Insolvency Court had granted the application and had passed the order of adjudication. Some of the creditors had appealed to the High Court against the order but during the pendency of the appeal the respondent (insolvent) had died. His creditors applied for impleading his son as his legal representative for the purposes of the appeal. The learned Judges referred to 69 P. B. 1888⁵ and observed that "the right to sue does not survive within the meaning of O. 22,

R. 4, Civil P. C., on the death of the respondent insolvent in an appeal by creditors against an order adjudicating him to be an insolvent, such an order being purely personal to him."

The attention of the learned Judges was drawn to S. 17, Provincial Insolvency Act of 1920, but they remarked that this did not affect the question, as the object of the section was that the death of the debtor should not affect the realization and distribution of his assets. This decision was followed in 13 Lah. 396³ by Harrison J. sitting in Single Bench. The facts of that case were somewhat different. There, certain creditors had applied for the adjudication of a debtor as insolvent. The creditor's application having been dismissed by the Insolvency Court, they had appealed to this Court. During the pendency of the appeal, the debtor died and the creditors applied to bring his legal representatives on the record for the purpose of the appeal. The application was dismissed. The learned Judge, following 9 Lah. 306² observed that on the particular facts before him the adjudication having been refused by the Insolvency Court, the successful party to these proceedings, namely the debtor, was wholly absolved from all manner of liability under the Insolvency Act. It was not, therefore, a question of liability surviving in consequence of an adjudication, but of the right of the creditors to resurrect the case against the representatives.

In A.I.R. 1932 Lah. 264⁵ Abdul Qadir J. in Single Bench took the opposite view. In that case during the pendency of a creditor's application for adjudicating the debtor as insolvent the debtor had died and the petitioning creditor had applied that his son be brought on the record so that the proceedings be continued for the purpose of realization and distribution of the property of the debtor. The proceedings were continued and the deceased was adjudged insolvent. It was objected by the son that the order was illegal. But the objection was overruled. The High Court upheld the order on appeal, following certain Calcutta and Madras cases to which reference will be made presently. Curiously enough in this case also none of the previous Punjab cases was referred to. In 51 Mad. 344⁶ the debtor had applied for adjudicating himself an insolvent. He died soon after and his sons objected that the proceedings had abated and should be struck off and the property of the deceased which the interim receiver had taken possession of be released to them. The contention was overruled and after enquiry the deceased was adjudicated insolvent. On appeal to the High Court it was held that under S. 17, Provincial Insolvency Act, an application by a debtor for adjudicating himself as insolvent, filed while he was alive, can be continued and adjudicated upon after his death. Reference was made to Sec. 108 of the (English) Bankruptcy Act and the case in (1886) 54 L.T. 682⁷ where it was held that the words "proceedings in the matter" in that section (which corresponds to S. 17 of Act 5 of 1920) include the adjudication of the debtor as insolvent after his death subsequent to the presentation of the application.

The same High Court considered the question at

5. ('32) 19 A.I.R. 1932 Lah. 264; 136 I.C. 788; 83 P. L. R. 151, Girdharilal v. Jugal Kishore.

6. ('28) 15 A.I.R. 1928 Mad. 476; 109 I.C. 94; 51 Mad. 844; 54 M. L. J. 585, Venkatarama Aiyar v. Official Receiver, Tinnevely.

7. (1886) 54 L.T. 682; 34 W.R. 550; 3 Morrell 69, In re Walker; Ex parte Sharp.

4. ('21) 6 A. I. R. 1921 Lah. 351; 59 I. C. 51; 9 P. L. R. 1921, Ram Jas v. Katha Singh.

a greater length in 51 Mad. 495⁸ and after an exhaustive discussion it was held that S. 17, Provincial Insolvency Act, applied to the case of a debtor dying before the order of adjudication, whether the petition for insolvency was filed by a creditor or by the debtor; and an order of adjudication could be passed on the petition after the debtor's death. In this case the widow of the deceased debtor had been brought on the record as his legal representative in spite of her objection and an order of adjudication was passed. It was pointed out in this case that the words "so far as may be necessary for the realization and distribution of the property of the debtor" in S. 17 of Act 5 of 1920 were enacted in place of words "as if he were alive" in S. 10 of Act 3 of 1907, in order to obviate objections by reason of some of the provisions of the Act, such as those in S. 43 relating to discharge. Obviously, a deceased person could not apply for discharge and difficulties were also created with regard to other provisions relating to the conduct of the insolvent. After the death of the insolvent, his conduct is of no importance except for certain purposes, e. g., setting aside fraudulent preference and alienations, etc. All that is necessary is to see that the assets of the insolvent are realized and distributed among the creditors. To make the matter clear and to obviate these difficulties it was thought proper to omit the words "as if he were alive" and substitute the words "so far as may be necessary", etc. But the provisions of the Act of 1920 are as clear as the earlier Act that the proceedings do not come to an end on the death of the debtor whether it occurred before or after adjudication: they continue for the purposes mentioned.

c In Calcutta the first reported case under the Provincial Insolvency Act was 57 I. C. 810=48 Cal. 379 in which it was held that "where on the death of an insolvent after the order of adjudication the proceedings in insolvency are directed to be continued under S. 10, Provincial Insolvency Act, at the instance of the representatives of the deceased insolvent, on general principles as well as on the express provisions contained in S. 24 (3) read with the further provision contained in S. 47 of the Act, it is incumbent upon the Court to permit the representatives of the insolvent to be present so as to give them an opportunity of cross-examining the claimants, creditors and their witnesses and to offer rebutting evidence in support of their plea that their claims have either been satisfied or are barred." The question whether the representatives of the insolvent have locus standi to submit proposals for confirmation was left open. The next case in that Court was A. I. R. 1930 Cal. 590¹⁰ where after the death of the debtor subsequent to the making of the creditors' application for his adjudication, the creditors applied to bring his sons on the record; the sons protested but the objection was overruled and the proceedings were continued.

a A case on all fours with the present is I. L. R. (1937) All. 616,¹¹ where the debtor had been adjudicated an insolvent upon a creditor's petition who had appealed against the order of adjudication but

had died pending the appeal. His heirs applied to be brought on the record in order to continue the appeal. The application was opposed by the petitioning creditor and reliance was placed upon the Punjab rulings referred to above. The learned Judges, however, dissented from these rulings and granted the application of the heirs to continue the appeal. They held that the right to contest an order of adjudication was not purely a personal right of the insolvent and therefore the appeal did not abate on his death; the right survived in favour of his heirs and they were entitled to be brought on the record and to continue the appeal. The Bombay High Court also, in a recent case reported in 44 Bom. L. R. 132,¹² has pronounced in favour of the same view.

With great respect, it is not correct to say, as has been assumed in some of the decisions of this Court, that the adjudication of a person as an insolvent is a matter purely personal to him. It affects not only his person but also his property which but for the adjudication would, on his death, have devolved on his heirs. They have a material interest in the proceedings which have a very far reaching effect on their rights. The right to resist the creditors' application for adjudication is therefore not a mere personal right which lapses on the death of the insolvent, it is a right which survives. Mr. Harnam Singh for the respondents concedes that if the debtor dies while the proceedings are in the Insolvency Court, further proceedings are to be continued in the presence of the legal representatives of the deceased who would be brought on the record for this purpose. If this be so, it is difficult to see how the proceedings would abate if the death of the insolvent takes place during the pendency of the appeal. If the Insolvency Court has on a creditor's application adjudicated the deceased as insolvent in spite of his opposition, the order very materially affects his heirs and they being "persons aggrieved" by that order have a locus standi to appeal if the debtor had died after the passing of the order of adjudication but before limitation for preferring an appeal had expired (S. 75, Provincial Insolvency Act). Again, if the insolvent himself had filed the appeal but died after its institution, there seems to be still less reason why the appeal should abate. The order of adjudication adversely affects the heirs so far as the property is concerned and the validity of the order can only be effectively adjudicated upon on appeal in their presence. The same consideration will apply equally, if the debtor had been adjudicated insolvent on his own application and the creditors had appealed making him a respondent, but he had died. In this case also the heirs have material interest in the decision of the appeal.

I would accordingly hold that 69 P. R. 1888¹ and 9 Lah. 806² were not correctly decided and that the order of the learned District Judge holding that the appeal in his Court had abated on the death of Bansi Dhar cannot be sustained. I would accordingly accept the appeal, set aside the order of the District Judge and remand the case to him for disposal in accordance with law. Costs shall abide the event.

MONROE J. — I agree.

MUHAMMAD MUNIR J. — I also agree.

G.N./R.K.

Appeal accepted.

8. ('28) 15 A. I. R. 1928 Mad. 480 : 110 I. C. 187 : 51 Mad. 495 : 55 M. L. J. 235, Ramathal Anni v. Kannappa Mudallar.

9. ('21) 8 A. I. R. 1921 Cal. 219 : 57 I. C. 810 : 48 Cal. 87, Sripat Singh v. Prodyat Kumar Tagore.

10. ('30) 17 A.I.R. 1930 Cal. 590 : 129 I. C. 622:84 C.W.N. 445, Ramesh Chandra v. Charu Chandra.

11. ('37) 24 A. I. R. 1937 All. 485 : 170 I. C. 585 : I. L. R. (1937) All. 616 : 1937 A. L. J. 491, Piaré Lal v. Muhammad Salamat-ullah Khan.

12. ('42) 29 A.I.R. 1942 Bom. 159 : I.L.R. (1942) Bom. 175 : 44 Bom.L.R. 158, Kantilal Bapubhai v. Rajni Kant Bapubhai.

A. I. R. (29) 1942 Lahore 214

BLACKER J.

Mt. Jawai—Petitioner

v.

Emperor.

Criminal Revn. Petn. No. 248 of 1942, Decided on 20th April 1942, for revision of order of Sess. Judge, Lyallpur, D/- 24th November 1941.

(a) Criminal P. C. (1898), Ss. 89 and 87 — Invalidity of proclamation issued by Magistrate's predecessor under S. 87 does not give Magistrate jurisdiction to interfere — Interference is limited by S. 89.

The fact that a proclamation under S. 87 issued by the Magistrate's predecessor was not valid does not give the Magistrate jurisdiction to interfere which he can do only within the four corners of Section 89. [P 214 C 2]

Cr. P. C. —

('41) Chitaley, S. 89, N. 1, Pt. 4.

('41) Mitra, Page 151, N. 177.

(b) Criminal P. C. (1898), Ss. 89 and 439 — Application purporting to be under S. 89 — Magistrate finding that proclamation issued by another Magistrate was invalid but declining to interfere on ground of want of jurisdiction under S. 89 — Decision upheld by Sessions Judge — High Court in revision held could consider legality of original proceedings.

On an application purporting to be under S. 89, the Magistrate held that the proclamation under S. 87 issued by another Magistrate in the original proceedings was invalid but declined to interfere on ground of want of jurisdiction under S. 89. His decision was upheld by the Sessions Judge. In revision to the High Court :

Held that the High Court in the exercise of its revisional powers could consider the legality of the original proceedings and grant relief under S. 89. [P 214 C 2]

Cr. P. C. —

('41) Chitaley, S. 87, N. 7 ; S. 439, N. 1.

('41) Mitra, Page 1422, N. 1203.

(c) Evidence Act (1872), S. 114 — Presumption under S. 114 is optional—Doing of act surrounded by exceptional circumstances — Court will not draw presumption under S. 114.

The presumption under S. 114 is only an optional presumption. The Court is not bound to make it and the counter-illus. (e) to S. 114 itself indicates a case in which the Court would not draw it, e. g., where there are some exceptional circumstances surrounding the doing of the act. [P 214 C 2]

Cr. P. C. —

('41) Chitaley, S. 87, N. 5, Pts. 4 and 5.

('41) Mitra, Page 143, N. 165.

(d) Criminal P. C. (1898), Ss. 537, 87 and 439 — Failure of justice within S. 537—Meaning of — Failure to fulfil any one of three requirements of S. 87 amounts to failure of justice within Section 537.

A failure of justice within S. 537 does not merely mean an erroneous decision or conclusion. It means that that procedure has not been followed which in the ordinary course would give the accused person or the persons with regard to whom proceedings under S. 87 are taken a fair opportunity to appear and clear his position. A failure to fulfil any one of

the three requirements of S. 87 amounts to failure of justice within the meaning of S. 537.

[P 215 C 1]

Cr. P. C. —

('41) Chitaley, S. 87, N. 5 ; S. 537, N. 32.

('41) Mitra, Page 143, N. 165 ; Page 1759, N. 1407.

K. S. Mohd. Amin — for Petitioner.

Nand Lal Salooja for Advocate-General—

for the Crown.

ORDER. — The petitioner in this case is the mother of one Mupal and she has brought this petition on his behalf. Mupal was wanted by the police in connexion with some serious criminal offences. Evidence was taken by a Magistrate that he was wilfully absconding. On 15th March 1940 that Magistrate in a brief order directed the issue of a proclamation and a warrant for attachment of his property. What happened after that is not clear as a number of papers which should in the ordinary course have been on the record are not there. There is a warrant of attachment, dated the same day as the order directing attachment of the property of Mupal. There is an endorsement by a constable on the back of this dated a week later to the effect that a copy of the proclamation had been posted on Mupal's house. There is, however, no copy of the proclamation on the file. There is no evidence that it was posted on the court-house, or that it fixed a specified date or gave 30 days notice, or was 'cried' in the village. Mupal did not appear and proceedings were taken for the sale of his property after the necessary period had elapsed. Subsequently, Mupal did appear and, I am told by counsel, has stood his trial and has in fact been acquitted. The learned Court of first instance in this case now before me held that the proclamation had not been validly issued. He pointed out quite rightly, however, that this did not give him any jurisdiction to interfere which he could only do within the four corners of S. 89, Criminal P. C. For reasons given in his judgment, he declined to interfere under that section and his decision was upheld by the Sessions Judge.

The matter here in revision bears a different aspect as the High Court in the exercise of its revisional powers can consider the legality of the original proceedings. There is undoubtedly evidence that some sort of proclamation was done. It is true that there is no validating memorandum under sub-section (3) of Section 87, Criminal P. C., which would have been conclusive evidence that the proclamation was regularly performed. There is, however, the ordinary legal maxim *omnia presumuntur rite esse acta* which is embodied in illus. (e) to S. 114, Evidence Act. Ordinarily, being satisfied that there was a proclamation of some sort, I might have held that the learned Magistrate was wrong in ignoring this presumption in coming to the finding that the proceedings of his predecessor were illegal. The presumption under S. 114 is, however, only an optional presumption. The Court is not bound to make it and the counter-illus. (e) itself indicates a case in which the Court would not draw it, e. g., where there are some exceptional circumstances surrounding the doing of the act. In this case I find that the order of the Magistrate that a proclamation should be made was itself only passed on 15th March. On the very same day that Magistrate has appended his signature to a document which recites that the proclamation had taken place 30 days before. Counsel for the Crown has argued that this was a printed form and that the Magistrate had

a merely omitted to strike out the words which did not apply. That may be so or may not be so : I am not here to try the Magistrate for negligence or otherwise. I venture to think, however, that when, whatever the reasons may be for which this was done, the only document which is really evidence of the fact that the proclamation was made is one in which there is a statement of fact which cannot possibly be correct, no Court would consider itself justified in drawing the presumption that that particular act had in those exceptional circumstances been regularly performed. I, therefore, accept the finding of Mr. Sher Jasjit Singh, the Magistrate in the present case, that two of the requirements of S. 87 had not been fulfilled and that the proceedings of the first Magistrate in regard to this proclamation were thereby vitiated.

b Counsel for the Crown has urged that S. 537, Criminal P. C., applies and that I am not entitled to interfere merely on account of these irregularities unless I am satisfied that there has in fact been a failure of justice. A failure of justice, however, does not merely mean an erroneous decision or conclusion. It means that that procedure has not been followed which in the ordinary course would give the accused person or the persons with regard to whom such proceedings are taken a fair opportunity to appear and clear his position. There are three requirements of S. 87 and all of them must be fulfilled. It is clear that the failure to fulfill any one of these three may well have resulted in the absconder in this case not coming to hear of the proceedings against him of which he might well have come to hear if that requirement had been fulfilled. Therefore, there does appear to me to have been a failure of justice in this case within the meaning of S. 537, Criminal P. C. For these reasons, I hold that the order of the Magistrate directing the sale of Mupal's property was void for illegality and I, therefore, set it aside. I also pass the necessary consequential order under S. 425 (1) (d) read with S. 439, Criminal P. C., and direct that the sale proceeds be returned to Mupal and any other property which has not been sold be restored to him.

G.N./R.K.

Petition allowed.

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BLACKER AND RAM LALL JJ.

Mohammad Sarwar s/o Shamas Din Qureshi — Convict — Appellant

v.

Emperor.

Criminal Appeal No. 619 of 1941, Decided on 20th February 1942, from order of Sess. Judge, Rawalpindi, D/- 19th April 1941.

(a) Criminal P. C. (1898), S. 288 — Under S. 288 Sessions Judge has absolute discretion to transfer statement made before Committing Magistrate to his own record — Statement so transferred is evidence in case for all purposes without limitation.

Section 288 makes evidence transferred under that section substantive evidence in the case for all purposes. The discretion is given to the Sessions Judge to transfer the statement made before a Committing Magistrate to his own record. Once he has done so, the evidence before the Committing Magistrate is as good as that recorded by himself and is useable for all purposes. The words "subject to the provisions of the Evidence Act" appearing in

S. 288 cannot be read so as to limit the purpose for which the deposition may be used. The deposition is to be treated as evidence in the case for all purposes. It is incorrect to say that S. 145 or S. 155, Evidence Act, governs the position and that depositions taken before a Committing Magistrate which contradict the evidence given in the Sessions Court, cannot be put in without putting to the witness portions of the statement with which it is sought to contradict the witness. Under S. 288, Criminal P. C., a Sessions Judge has an absolute discretion to allow the statement of a witness to be transferred. Once a statement has been transferred then the statement is evidence for all purposes without limitation : ('37) 24 A. I. R. 1937 P. C. 119 ; 51 P. R. Cr. 1887 and ('22) 9 A. I. R. 1922 Lah. 1, *Rel. on*; 28 All. 683, *Approved*; 7 All. 862 and ('30) 17 A. I. R. 1930 Pat. 338, *Dissent.* [P 216 C 2 ; P 217 C 1]

Cr. P. C. —

(41) Chitaley, S. 288 N. 5 ; N. 7 Pt. 3.

(41) Mitra, Page 995, N. 898 ; Page 997, N. 899.

(b) Evidence Act (1872), Ss. 145 and 155 — S. 145 is included in S. 155.

The whole of the ground covered by S. 145 is included in S. 155. [P 216 C 2]

Mian Abdul Aziz — for Appellant.

S. C. Manchanda for Advocate-General —

for the Crown.

RAM LALL J.—Mohammad Sarwar was tried by the learned Sessions Judge, Rawalpindi, for the murder of his wife Mt. Fatima, and convicted and sentenced to transportation for life. He has appealed through Mian Abdul Aziz and Mr. S. C. Manchanda has appeared for the Crown in support of the conviction. The case for the prosecution is that the appellant had been unable or unwilling to build a suitable house for himself and his wife after marriage and therefore the wife left him soon after marriage and went to live with her parents while the appellant continued to live the life of a bachelor. Efforts were made to effect a reconciliation but without success. While the deceased was living with her parents she contracted illicit intimacy with some person and became pregnant. As the appellant could not have been responsible for this pregnancy, there could be no doubt regarding her unchastity. One Feroze told the appellant of this pregnancy which was nearly six months advanced by then and said the child would inherit his property though the child was not his. The appellant, in order to vindicate his honour, decided to kill her. There is no reason to distrust the evidence that the deceased was living with her parents and that her husband had no access to her. It is also clear that she was about to be the mother of an illegitimate child and that Feroze informed the appellant of this fact. This, in my opinion, constitutes a sufficient motive for the appellant to have decided to kill his wife.

On 16th November 1940 Mt. Fatima deceased and her younger sister Hussain Bi took their cattle out to graze. At about noon time, while Mt. Hussain Bi was engaged in bathing a she-buffalo she heard cries and looked up and saw the appellant attacking her sister with a hatchet. She raised cries and one Hukam Dad and others arrived at the scene of occurrence when the appellant ran away. The father of the deceased arrived soon after and made a first information report in which he detailed the circumstances which had estranged the relations between the deceased and the appellant and mentioned Hussain Bi as the eye-witness of the murder. The

The learned Magistrate in acquitting the respondent has observed that inasmuch as he had been a license-holder for a number of years and had been getting his license renewed regularly until January 1940, the mere fact that he failed to deposit the fee in time and get it renewed for 1941 was not tantamount to his "holding the gun without a license." As shown above, this view is not warranted by the law and is clearly erroneous. In support of his conclusion, the learned Magistrate has referred to Note 2 appended to the conditions printed on the license which prescribe the fees payable if the license is renewed within one month of the date on which it expired and those payable after one month from that date. This Note, however, merely provides a period of grace during which the application for renewal may be made and the fees payable thereon deposited. It does not lay down that the quondam license-holder is entitled, as of right, to have the license renewed on payment of the fee mentioned. Another reason given by the learned Magistrate in support of his conclusion is that the licenses of several other persons had, as a matter of fact, been renewed by the District Magistrate, Lahore, long after the dates on which they had expired: in one case the renewal was as late as three years after the date of expiry. This circumstance, however, does not affect the legality of the respondent's possession of the gun after the expiry of his license, though it might indicate that the respondent's failure to apply for renewal within the prescribed time was not mala fide.

We hold that the respondent's possession of the gun in 1941 was unlawful and he has been wrongly acquitted. We think, however, that a nominal sentence of fine is called for in the case. The respondent is a business man and had gone to Delhi at the time when the application for renewal should normally have been made and was detained there for a considerable time. He had asked a friend to make the application for renewal and pay the requisite fee, but the latter failed to do so at the proper time. There also seems to have been a misunderstanding as to the true import of the Note attached to the conditions printed on the license. He was apparently under the erroneous impression that it was not obligatory on a previous license holder to apply for renewal before the expiry of the license. In these circumstances and having regard to the fact that the respondent is not shown to have used the gun during the period in question, we think that the ends of justice will be met by imposing a fine of Rs. 5. We also think that this is not a case in which an order for confiscating the gun should be passed under S. 24. We accept the appeal, set aside the order of acquittal, convict the respondent under S. 19 (f), Arms Act, and direct him to pay a fine of Rs. 5 or, in default, suffer imprisonment for 15 days.

G.N./R.K.

*Appeal accepted.***A. I. R. (29) 1942 Lahore 301****TEK CHAND AG. C. J. AND SALE J.***Emperor***v.****Prem Singh s/o Sardha Singh—Convict Respondent.**

Criminal Appeal No. 185 of 1942, Decided on 7th July 1942, from sentence passed by Sess. Judge, Attock District at Campbellpur, D/- 5th November 1941.

Penal Code (1860), S. 300, Exception I, S. 302 and S. 304—A filing criminal complaint against B—Both getting into different lorries at motor-stand — B on seeing A in another lorry getting out of his lorry and entering in A's lorry to give A bit of his mind—Altercation ensuing—B stabbing A as result of which he died—Mere sight of A travelling in other lorry held did not constitute grave and sudden provocation within section 300, Exception I — Offence held fell within S. 302—Transportation held proper sentence.

A, who had filed a criminal complaint against B, had got into a lorry at the motor-stand to proceed to the Court. B also came to the motor-stand and got into another lorry. On seeing A in the other lorry B got out of his lorry and entered the other occupied by A probably to give A a bit of his mind. An altercation probably ensued in the course of which B took out his kirpan and stabbed A as a result of which he died. None of the eye-witnesses was able to explain how the attack by B on A started :

Held that the offence came within S. 302. The mere sight of an enemy travelling in another lorry could not be said to be grave and sudden provocation sufficient to reduce the offence of culpable homicide from S. 302 to S. 304. [P 302c,g]

Held further that as it was not shown how the attack started and it was possible that there was some sort of altercation and the deceased might have been provocative, the capital sentence was not called for even though the accused was the aggressor. [P 302g]

Penal Code —

(40) Batainal, Page 739, Note "No grave provocation;" and Page 762 (763), Note "Punishment where doubt exists."

(36) Gour, Page 998, Para. 3323; and Page 1031, Para. 3431.

Basant Krishan, Assistant Advocate-General —
for the Crown.

S. Harnam Singh — for Respondent.

SALE J.—Prem Singh was committed to the Court of Session charged under S. 302 with the murder of Gurdit Singh by stabbing him with a kirpan on 18th August 1941. The learned Sessions Judge convicted Prem Singh under S. 304, Part 1, Penal Code, and sentenced him to seven years' rigorous imprisonment. Prem Singh has not appealed, but the Crown has appealed against the acquittal under S. 302, Penal Code. Gurdit Singh deceased had filed a complaint against Prem Singh under S. 392, Penal Code, which according to the evidence of the Magistrate's Reader (P. W. 11) was pending in the Court of a Magistrate at Campbellpur. The date of hearing was fixed for 14th August 1941, and on 13th August 1941, both Gurdit Singh and Prem Singh were on their way to the Court. They met at the lorry stand at village Salmoon, a village about three miles from police station Chaurtra. The accused Prem Singh was in the lorry of Ghulam Mohammad, P. W. 8, while Gurdit Singh deceased was in the lorry of Nawab Khan, P. W. 9. The time was 6-30 A. M. and it appears that the accused on seeing Gurdit Singh in Nawab Khan's lorry got out of his lorry and went over to Gurdit Singh in Nawab Khan's lorry and there stabbed him repeatedly with a kirpan. The medical evidence shows that Gurdit Singh deceased sustained two serious stab injuries, one in the abdomen and the other in the chest, which were the cause of death, and, in addition, there were no less than twelve other incised wounds.

This attack was witnessed by Sorab (P. W. 4), lambardar of Salmoon, whose attention was attracted by the outcry, by Sardha Singh, (P. W. 5) a passenger in Ghulam Mohammad's lorry, by Jalal (P. W. 6) another passenger, and others. Prem Singh, after stabbing the deceased, ran away and was followed by Ghulam Mohammad (P. W. 8) who drove his lorry with the eye-witnesses in pursuit of the accused. They arrested him about half a mile from the lorry stand. Sorab lambardar was one of the eye-witnesses who pursued the accused in Ghulam Mohammad's lorry and helped to arrest him. Later he made the first information report at the police station which was recorded at 9-30 A. M. In his statement Prem Singh accused said that Gurdit Singh on his arrival began to abuse him, that he (Gurdit Singh) assaulted him in the lorry and beat him; also that Gurdit Singh assaulted him with his kirpan and caught him by the throat. Prem Singh pleaded that he used his kirpan in self-defence. The learned Sessions Judge rejected the contention that the accused was compelled to use his kirpan in self-defence, but he appears to have taken the view that the offence of the accused was reduced to S. 304 by virtue of the application of Exception 4 to S. 300, Penal Code. He does not mention Exception 4 in so many words, but he seems to imply the application of this exception in the following words :

"When he (i. e. the accused) perceived the deceased sitting in Nawab Khan's lorry, he was apparently provoked by the deceased's appearance and went over to give him a bit of his mind. There was an altercation, and the accused brought his kirpan into play. The fight was, to all intents and purposes, unpremeditated."

If the learned Sessions Judge had Exception 4 to S. 300, Penal Code, in mind and having rejected the self-defence plea there is no other exception which he could have had in mind—he has overlooked one essential ingredient of Exception 4, that is that the accused should not have taken undue advantage or acted in a cruel manner. Obviously the act of the accused in drawing his kirpan and using it repeatedly to stab the deceased (who, as the Sessions Judge himself has found, did not use his own kirpan or any other weapon in defence) certainly indicates that the accused took undue advantage and acted in a cruel manner. Moreover, the learned Sessions Judge appears to think that the mere sight of an enemy travelling in another lorry is grave and sudden provocation sufficient to reduce the offence of culpable homicide from S. 302 to S. 304, Penal Code. This is a very dangerous proposition for which there can be no warrant. Indeed Mr. Harnam Singh on behalf of the respondent does not support this reasoning of the learned Sessions Judge for reducing the offence to S. 304, Penal Code. He has instead endeavoured to justify the theory of self-defence advanced by the accused himself in his statement, which the learned Sessions Judge had rejected. In this statement the accused had pleaded that the deceased assaulted him with a kirpan and caught him by the throat. This plea is negatived, as pointed out by the learned Sessions Judge, by the fact that while the deceased no doubt had a kirpan it was recovered from the lorry, resting undisturbed in its scabbard, showing that the kirpan was never used. Nor indeed is there an iota of evidence on this record to indicate that Gurdit Singh used his kirpan, or even threatened the accused with his kirpan.

As regards the accused's plea that Gurdit Singh caught him by the throat it is to be noted that while Prem Singh did receive some trivial injuries there

were no injuries on his throat. Mr. Harnam Singh refers us to the cross-examination of Sardha Singh, P. W. 5, one of the eye-witnesses to the effect that while the witness cannot say how the fight began he saw Gurdit Singh, then holding the accused from his neck." It is obvious, however, from Sardha Singh's evidence that what he means is that when Prem Singh was attacking him with a kirpan, Gurdit Singh was trying to defend himself by holding the accused by the neck. This statement therefore does not help the accused.

It is true that Prem Singh received some injuries. He was medically examined and was found to have a scratch mark on his right leg and three contusions, one being a long contusion mark 8" x 1" on the back. Mr. Harnam Singh suggests that these injuries indicate that Prem Singh was attacked by the deceased. In the Sessions Court these injuries were explained by Ghulam Mohammad, P. W. 8 and Nawab Khan, P. W. 9, as having been given to the accused at the time when he was arrested. Nawab Khan, for example, says that when the accused was arrested, he gave him a cane-blow while others gave him fist-blows. This cane-blow would no doubt explain the contusion mark on the back. Mr. Harnam Singh, however, points out that these witnesses did not give this explanation of the accused's injuries before the police and he urges that, they should not be believed now, when they say that the injuries were given in arresting the accused. Mr. Harnam Singh therefore asks us to draw the inference that the injuries must have been given to Prem Singh by the deceased. It is, however, necessary to point out that this was not the accused's case. His contention was that he had been assaulted with a kirpan, and we are satisfied from the injuries actually received by the accused that they certainly could not have been given to him by a kirpan. It is far more likely that they should have been given him, as now stated by the witnesses Ghulam Mohammad and Nawab Khan, at the time when he was arrested. We therefore reject the plea of self-defence and since no other exception applies, it is clear that the accused is guilty under S. 302, Penal Code. We therefore accept the Crown appeal and alter the conviction to one under S. 302, Penal Code. As regards sentence, it must be borne in mind that none of the eye-witnesses can explain how this attack started. The fact that the accused went from his own lorry over to the deceased's lorry shows that the accused was the aggressor but it may well be that there was some sort of altercation and the deceased may have been provocative. We therefore refrain from imposing the capital sentence and sentence the accused to transportation for life.

G.N./R.K.

Appeal accepted.

A. I. R. (29) 1942 Lahore 302
MONROE J.

Mrs. Heather Florence Myles Hunter
— *Petitioner*

Mr. Michael Bernard Hunter
— *Respondent.*

Original Matrimonial No. 9 of 1942, Decided on 8th July 1942, for dissolution of marriage.

Indian and Colonial Divorce Jurisdiction Act, 1926 (16 and 17 Geo. V, Ch. 40), S. 1 — High Court under S. 1 cannot grant declaration of nullity of marriage — Petition for dissolution of marriage on ground of husband's impotence

- a involves determination that marriage is null — High Court has no jurisdiction to entertain it.

The Act must be read strictly with reference to the legislation which confers jurisdiction on the English Courts. There has always existed in England a distinction, whether it is logically justifiable or not, between the dissolution of a marriage and the determination that a marriage is null. The High Court has no jurisdiction under the Indian and Colonial Divorce Jurisdiction Act to grant a declaration of nullity of marriage. [P 303h; P 304c]

A petition by the wife under S. 1 for dissolution of marriage on the ground of husband's impotence involves the determination that the marriage is null and therefore the High Court has no jurisdiction to entertain it: (1931) L. R. 1931 P. 29, *Expt.*

[P 303b; P 304d]

- b *Norman Edmunds* — for Petitioner.

A. R. Khosla — for Respondent.

- c **ORDER.**—This is a petition under S. 1, Indian and Colonial Divorce Jurisdiction Act, 1926, for dissolution of marriage on the ground that the same has not been consummated owing to the respondent's "impotence". The prayer of the petitioner is that the Court may be pleased to dissolve the said marriage or to grant a decree of divorce or grant such other relief in such terms as the Court may think fit. The question at once arises whether this Court has jurisdiction to grant a decree of nullity under the Act. For the purpose of the discussion, I may assume that in all other respects the petitioner's case is established. The jurisdiction given to this Court by the Act of 1926, when the parties are British subjects domiciled in England or Scotland, is to make a decree for dissolution of the marriage; and it is provided that the grounds on which such a decree may be granted shall be those on which such a decree might be granted by the High Court in England. I may summarize the ingenious argument of counsel for the petitioner as follows:

- The form of the decree is immaterial; admittedly, a decree based on impotence is in form a decree for nullity of marriage but since the marriage is voidable, not void, and subsists till a decree is made, the decree in effect dissolves the marriage; power is given to this Court to dissolve marriages, and in making a decree on the ground of impotence the Court would exercise that jurisdiction. The main thesis of the argument is based on the judgment in L. R. (1931) P. 29,¹ where the nature of a decree annulling a marriage on the ground of impotence was very fully examined. Bateson J. said:

- d "Counsel for the petitioner contends that there is no ground for distinguishing one class of nullity from another, but I think that I have pointed out several distinctions, the greatest of which is the one being void and the other being voidable and not always voidable. He says that the former Courts always tried cases of nullity for impotence. That is true. The cases of nullity which the Ecclesiastical Courts always tried, no doubt, included cases of impotence and the impossibility of dissolving a marriage by them was got over by calling it nullity when in essence it was dissolution. To call it a suit for nullity does not alter its essential and real character of a suit for dissolution."

For the purpose of the decision in L. R. (1931) P. 29¹ when the jurisdiction of the English Courts was questioned on the ground that the domicile of

the parties was Scottish it was considered necessary to consider the true character of a decree of nullity on the ground of impotence. I do not think I am entitled to take these general principles into consideration in construing the section which gives this Court jurisdiction; I am bound to determine what is the meaning of the words "to make a decree for dissolution of the marriage" as used in the Indian and Colonial (Divorce Jurisdiction) Act. It is, therefore, necessary to consider the jurisdiction now exercised by the Probate Divorce and Admiralty Division in relation to marriage. Prior to the Reformation, matrimonial causes were the concern of the Church Courts. One of the fundamental doctrines of the church was that a marriage was in general incapable of dissolution; and the few exceptions to the rule were of such a character (they were directly connected with matters of faith) that they indicate how inflexible the doctrine was. There were, however, certain impediments, called diriment impediments, which invalidated a marriage of which one was the impediment of impotence. I have been unable to have access to older editions of the canons of the Roman Catholic Church, but have found that the present form of the canon on this subject is as follows:

"Impotency, antecedent and permanent, either in the man or in the woman, whether known or not to the other party, whether absolute or relative, invalidates the marriage in virtue of natural law."

I think that it is beyond question that according to the canon law, where impotency existed, there was no marriage. After the Reformation, matrimonial jurisdiction was transferred to the Ecclesiastical Courts and immediately before the Matrimonial Causes Act, 1857, became law, these Courts, whatever wider jurisdiction they may have claimed at an earlier date, had not power to dissolve a marriage; and divorce a *vinculo matrimonii* was obtainable only by legislation. The relief given by the Ecclesiastical Courts was according to the nature of the case (i) divorce a *mensa et thoro*; (ii) declaration of nullity. By the Matrimonial Causes Act, 1857, the jurisdiction in respect of divorces a *mensa et thoro* and suits of nullity of marriage became exercisable by "the Court of Divorce and Matrimonial Causes" and is now exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice. For the divorce a *mensa et thoro* was substituted a sentence of judicial separation, but the nature of the remedy remained unaltered. By the Act, a completely new remedy was made obtainable from the Courts; the Court was empowered to pronounce a decree declaring a marriage to be dissolved; the grounds on which a marriage may be dissolved are set out in the Act and do not include impotence; and it may be noticed that in S. 41, the phrase is used "a decree of nullity of marriage, or a decree of judicial separation or a dissolution of marriage or decree in a suit of jactitation of marriage." Subsequent legislation continued to distinguish between "a decree for divorce and decrees for nullity of marriage; for example, the decree for divorce in the first instance was by the Matrimonial Causes Act 1860 directed to be a decree nisi, the form of decree in a suit for nullity remaining as before and it was not till 1873 that the form of decree for nullity was altered in the same way. The distinction between the forms of relief is maintained by the Judicature (Consolidation) Act, 1925.

The Indian and Colonial Divorce Jurisdiction Act must be read strictly with reference to the legislation which confers jurisdiction on the English Courts. It is not possible that the phrase "the dis-

1. (1931) L. R. 1931 P. 29 : 100 L. J. P. 16 : 144 L. T. 212 : 95 J.P. 78 : 29 L. G. R. 353 : 74 S.J. 863 : 47 T. L. R. 140, *Inverclyde v. Inverclyde*.

a solution of a marriage" should have one meaning in the Judicature (Consolidation) Act, 1925, and another in the Indian and Colonial Divorce Jurisdiction Act. I have shown that throughout the period of the exercise of jurisdiction in matrimonial causes a clear line has been drawn between divorce and nullity. There is nothing to indicate that the Legislature for the first time ignored the distinction in the Indian and Colonial Divorce Jurisdiction Act. I doubt whether any other considerations are relevant to this discussion, but I may mention one or two points which support the view that it was not intended to confer on the Courts in India jurisdiction in nullity suits. The Indian and Colonial Divorce Jurisdiction Act was passed in peculiar circumstances: the purpose of the Act is expressed to be "to confer on Courts in India and other parts of His Majesty's Dominions jurisdiction in certain cases with respect to the dissolution of marriage, the parties whereof are domiciled in England or Scotland, and to validate certain decrees granted for the dissolution of marriage of persons so domiciled" and the provisions of section 3 which validates decrees granted under the Indian Divorce Act, 1869, very clearly show that doubts about the validity of such decrees had arisen. The Indian Divorce Act, 1869, recognizes the distinction between decrees for dissolution and decrees for nullity and the words "decrees for dissolution" must be confined to "decrees for dissolution" as defined by the Indian Divorce Act. It is impossible to conceive that in view of this reference to Indian law in which the phrase must be confined to dissolution proper, the same phrase should have a more extended meaning in another section of the Act. The Indian and Colonial Divorce Jurisdiction Act was intended to remedy what was regarded as an existing evil; its operation cannot be extended beyond providing a remedy for the particular evil, without express and clear provisions. There has always existed a distinction, whether it is logically justifiable or not, between the dissolution of a marriage and the determination that a marriage is null. Whether or not a declaration of nullity based on impotence effects dissolution of the marriage seems to be not to be material to the question which I have to decide. The phrase 'dissolution of marriage' in the Indian and Colonial Divorce Jurisdiction Act must be construed with reference to the meaning of the phrase in the Acts in conjunction with which that Act must be read. This Court has no jurisdiction under the Indian and Colonial Divorce Jurisdiction Act to grant a declaration of nullity. The facts alleged are insufficient for a declaration under the Indian Divorce Act. I am therefore compelled to dismiss this petition.

G.N./R.K.

Petition dismissed.

A. I. R. (29) 1942 Lahore 304

BECKETT J.

Punjab National Bank Ltd., Rawalpindi through Manager—Decree-holder—Appellant

v.

Firm K. B. Seth Adamji Mamoonji through Seth Adamji Mamoonji and others—Judgment-debtors—

Respondents.

Exn. First Appeal No. 69 of 1941, Decided on 9th July 1941, from order of Senior Sub-Judge, Rawalpindi, D/- 14th December 1940.

Punjab Court of Wards Act (2 of 1903), S. 31 (3)—Execution can proceed on strength of certificate filed in original suit.

Section 31 (3) refers only to proceedings in respect of which no certificate had already been filed under S. 31 (2) either in the original suit or in the course of execution proceedings. If a certificate was filed in the original suit, execution of decree can proceed on the strength of that certificate and a fresh certificate is not necessary: ('20) 7 A.I.R. 1920 Lah. 305, *Approved*. [P 304f,g]

J. N. Aggarwal — for Appellant.

Achhru Ram — for Respondent 6.

JUDGMENT. — The Punjab National Bank brought a suit for recovery of a loan against the firm of Khan Bahadur Seth Adamji Mamoonji & Sons, the estate of which is now under the control of the Court of Wards. A certificate was presented under S. 31 (2), Punjab Court of Wards Act, 1903, to the effect that the claim had been notified to the Deputy Commissioner under S. 26. A decree was granted for the recovery of the amount due as an unsecured loan and the Punjab National Bank then proceeded to take out execution.

An objection has been raised that the decree-holder should file a fresh certificate of the notification of the claim under S. 26 and the executing Court has held that a fresh certificate is required by S. 31 (3). "As I read sub-s. (3), however, I think that it was intended to refer only to proceedings in respect of which no certificate had already been filed under sub-s. (2) either in the original suit or in the course of execution proceedings. It was held in 3 P. R. 1919¹ that a fresh certificate was not necessary with each new application. If that is so, the object is not to give notice that execution has actually been taken out, but merely that the Deputy Commissioner should have notice of the claim, so that no useful purpose would be served by putting in a fresh certificate of the original notification of the same claim in the same Court. All that sub-s. (3) requires is that proceedings in execution should not be taken out unless a certificate has been filed, and if this is filed on the record of the original proceedings, it seems to me that there has been a sufficient compliance in the circumstances of the case. For these reasons, I accept the appeal, set aside the order of the executing Court for the consignment of the proceedings to the record room, and direct that execution should now proceed on the strength of the original certificate. The decree-holder will receive all costs incurred by him in connexion with the objection raised regarding the filing of a fresh certificate.

G.N./R.K.

Appeal accepted.

1. ('20) 7 A.I.R. 1920 Lah. 305 : 58 I. C. 635 : 3 P.R. 1919, Deputy Commissioner, Amritsar v. Balla Mal.

